INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement of the Case	3
Argument	7
1. There is No Important Question of Federal Law	7
2. There is No Conflict of Decision	9
3. The Decision Below is Clearly Correct	12
Conclusion	14

CITATIONS

CASES:

Branman v. *Stark*, 342 U.S. 451	3, 9
Graver Tank Mfg. Co. v. *Linde Air Prod. Co.*, 336 U.S. 271; 339 U.S. 605	14

STATUTES:

Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U.S.C., § 601, et seq.)	3
§ 10(i)	9
Agriculture and Markets Law of New York (McKinney's Consolidated Laws, Book 2-B,	
§ 252, et seq.)	3, 10
§ 258-m(10) and (11)	10
§ 258-n	9

MISCELLANEOUS:

3 F.R. 1945, 1951, 2100, 2102	9
7 CFR 1955 Supp. § 927.76	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 697

OSCAR L. GRANT, ET AL., *Petitioners,*

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT COOPERATIVES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and opinion of the United States District Court for the District of Columbia (R. 175-216) are unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit also is unreported but is printed at pages 26-39 of the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The New York State Commissioner of Agriculture and Markets and the United States Secretary of Agriculture have established a joint State-Federal program for the regulation of milk for the New York metropolitan milk marketing area. The joint program is carried on pursuant to a State Order issued by the Commissioner under New York State laws and a complementary and identical Federal Order issued by the Secretary under the Agricultural Marketing Agreement Act of 1937. The State Order and the Federal Order each contain identical provisions compensating qualified cooperatives for the cost to them of specific market-wide services required to be performed by them for the benefit of all producers in the milkshed.

The validity of the State Order provisions is not contested by petitioners and petitioners abandoned in the Court of Appeals their contention that the Secretary's findings with respect to the Federal Order provisions were not supported by substantial evidence on the whole record. The narrow question presented, therefore, is whether under the circumstances set forth in the Secretary's uncontroverted findings the Federal Act authorizes the cooperative payment provisions adopted in the Secretary's Order as part of the joint State-Federal program.

There is a second question as to whether the action is a class action. That question was not decided by the Courts below and will be reached and become

necessary of decision only in the contingency of a reversal of the judgment below on the merits. The question, therefore, is not here discussed.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U.S.C., § 601, et seq.) are set forth in the appendix to the petition, pages 1-7. The order involved (7 C.F.R. 1955 Supp., § 927.76) appears in the appendix to the petition, pages 14-26, and also in the Record at pages 125-132 and the findings of the Secretary of Agriculture with respect thereto in the Record at pages 108-123. The pertinent New York State statutes (McKinney's Consolidated Laws, Book 2-B, § 252, et seq.) and order are set forth in the appendices to the brief in opposition of the Commissioner.

STATEMENT OF THE CASE

This action is instituted by six milk producers in the milkshed supplying the metropolitan New York milk market. They seek to have declared illegal the cooperative payment provisions of the Federal order (R. 15).

These provisions of the Federal and State orders were first adopted by the Secretary and the Commissioner in 1938. (R. 681, 684-6; 3206, 3224-6) In 1952 the Boston order cooperative payment provisions were held invalid in *Brannan* v. *Stark*, 342 U.S. 451. This Court contrasted the provisions of the New York order (p. 461, n. 12). At that time, four Federal milk orders contained cooperative payment provisions, those for Dayton-Springfield, Cincinnati, and New

York, as well as Boston. Following this Court's decision, the Secretary concluded that the facts as to cooperative payments in the Dayton-Springfield and Cincinnati orders fell within the scope of the *Stark* decision and so he terminated those provisions, as well as those of the Boston order (R. 3168-3170). At the same time, the Secretary concluded that the facts as to the cooperative payment provisions in the New York order fell without the scope of the *Stark* decision and so he kept those provisions in effect (R. 3168, 108-9).

Thereupon this action was brought. The New York State Commissioner and 68 cooperatives intervened. (R. 46, 58) In consequence of order amendments providing for federations of cooperatives so as more effectively to render the marketwide services, two federations were formed of those cooperatives and 14 others and also intervened (R. 226). The District Court held the New York cooperative payment provisions valid and the Court of Appeals affirmed, one judge dissenting.[1] The Court of Appeals continued in effect the District Court action (R. 227-9) providing that certain percentages of the cooperative payments be held in escrow *pendente lite*. The cooperatives throughout the litigation have been performing the full services with only partial compensation.

Also in 1952 the Secretary and the Commissioner appointed a committee of 10 experts chosen from the faculties of six universities of States within the milk-

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[1] The dissenting judge stated—

> "Were it not for my inability to distinguish that case (*Brannan* v. *Stark*), I would agree entirely with the excellent analysis and disposition of the problem which appear in the present opinion of this Court."

shed to investigate cooperative payments under the New York orders (R. 109, 2120-2126). Members of the committee testified at length at public hearings held in 1953 and their testimony is a part of the Record in this case (R. 2119-2233, 2238-2325, 2418-2489, 2722-2757, 2777-2827, 2946-2980). Following these hearings and on the basis of a voluminous record consisting of approximately 40,000 pages, the Secretary and the Commissioner amended the cooperative payment provisions effective in December 1953 (R. 90-106, 65-79). The District Court held that the Secretary's findings were based upon substantial evidence in this record and the Court of Appeals held that the cooperative payment provisions are shown—

> "by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted."

In the Court of Appeals petitioners abandoned their attack on the findings.

Under the State and complementary Federal orders qualified cooperatives are required to render marketwide services for the benefit of all producers. They are compensated for these services from the producer settlement fund (see for description of the fund, the Court of Appeals opinion, Pet. App., pp. 28-29) which is a single joint fund under the State-Federal program. Likewise the payments are jointly made under the joint authority derived from the State and Federal orders. The Secretary found that in performing such marketwide services the cooperatives incur expenses at least equal to the amount of their compen-

sation (R. 119). On the other hand, the orders specifically require the cooperatives themselves to pay the entire cost of cooperative services that are not of marketwide character. To insure that cooperative payments are solely for marketwide services of benefit to all producers, cooperatives are required to receive from their members not less than 1¢ per cwt. of their members' milk to cover the entire cost of services that are not of marketwide benefit (R. 119, 126).

The value of the marketwide services was found by the Secretary to be worth more to each producer than the approximately $25 a year cost to him for the services (R. 118-119). The cooperative payments are not gratuities but are made solely for value actually received by all producers. Further, the Secretary found that all producers receive the value of the marketwide services and all producers should, in consequence, pay for them on the same pro rata basis without regard to whether or not they happen to be members of cooperatives performing the services (R. 114). The cooperatives are required to perform the marketwide services enumerated in the order and upon failure payment is discontinued and the action taken is publicly announced (R. 120-121).

The marketwide services are numerous and varied. They concern such matters as so utilizing surplus that the greatest return will be brought to all producers from the marketwide pool; advancing the interests of producers at the numerous hearings on pricing and other amendments and maintaining staffs and developing economic data for this purpose; keeping informed of current market conditions and other changing circumstances in the highly complex field of

milk marketing and, since price fixing is not static, initiating requests for amendments; maintaining standby operating marketing facilities; conducting comprehensive educational programs among all producers; supplying to the market fluid milk in times of short supply; and other required marketwide services. These services and their need for the benefit of all producers are set forth in detail in the Secretary's findings (R. 111-118) and in the Court of Appeals opinion.

ARGUMENT

1. There Is No Important Question of Federal Law

The question is one of statutory interpretation. It is not of general or even wide import but is limited to the power of the Secretary to adopt a provision found in one only of his numerous marketing orders applicable to a single commodity in a single area.

The Secretary of Agriculture has in operation under the Agricultural Marketing Agreement Act of 1937 95 orders dealing with the marketing of fruits, nuts, tobacco, potatoes, and milk. The question here is the validity of one section of one of those orders. That Order while important to the New York milkshed, is not an order of national scope. There are 64 milk marketing orders of the Secretary, each applicable to one of 64 different milk marketing areas scattered over the country. None of the other marketing orders, whether for milk or other commodities, contains cooperative payment provisions.

The Court of Appeals' decision is clearly limited to the application of the statute to the "significantly different" facts (R. 108-109) found to exist in the New

York milkshed and to an order fashioned to conform to those limited and unique facts. The situation is isolated and the decision narrow. Contrary to petitioners' assertion (Pet. p. 17) the Court of Appeals decision does not make it possible to provide for cooperative payments out of producer settlement funds in other orders for other areas.

Neither is there any basis for petitioners' implied assertion (Pet. p. 16) that the Secretary will adopt cooperative payment provisions in other marketing orders. A milk marketing order is tailored by the Secretary to fit the problems of the particular milk marketing area. Amendments thereto are not hastily adopted but only after extensive public hearings, findings by the Secretary on the basis of the records at such hearings, a producer referendum, and other proceedings under the Agricultural Marketing Agreement Act. It is not to be presumed that the Secretary would exercise his power frivolously or promiscuously.

Second, the unique characteristics of the New York milkshed prevent the question from becoming an important question of Federal law. The Secretary has found that (R. 111)—

> "The factors of size, diversity of conditions, specialization among handlers, divergency of interests, and complexity of price structures make this milkshed and regulatory program unique."

The other 63 regulated milksheds have not been found to possess characteristics or present problems comparable to those of the New York Order milkshed and there is no other milkshed where the cooperatives are required to perform corresponding marketwide services.

Third, the Secretary's Order for the New York milk marketing area is unique in being complementary to an identical order issued under Acts of the New York State Legislature. Complementary State and Federal orders are authorized by the New York law (§ 258-n) and the Federal Act (§ 10(i)) and are designed to operate as a single joint order (3 F.R. 1945, 1951, 2100, 2102). They provide for a single program administered by a single market administrator appointed jointly by the Secretary and the Commissioner.

The Federal order deals with a local area and its particular local problems. It stands alone in its inclusion of cooperative payment provisions, in being complementary to a State order, and in providing for a joint Federal-State program. The Federal question has no importance beyond the particular facts and parties involved. An episode in the history of milk marketing arising from economic facts peculiar to a particular local area, is not a basis for granting certiorari when the Court of Appeals decision is correspondingly restricted. For these several reasons, the question of Federal law is not an important Federal question.

2. THERE IS NO CONFLICT OF DECISION.

Petitioners urge the granting of the petition mainly on the ground that the District Court and the Court of Appeals decisions are in conflict with the decision of this Court in *Brannan* v. *Stark*, 342 U.S. 451. There is no conflict for the differences are factual. The *Stark* case dealt with the Boston Order. The facts as to the Boston Order were "critically different"

from those as to the New York Order. Among those differences are—

a. *Complementary State-Federal Orders.*—The Boston milk marketing program was solely a Federal order program. Here we have a joint State-Federal program. There is a single producer settlement fund established under the combined State and Federal authority from which the cooperative payments are made. There is no segregation of these payments or allocation of them in any respect between the State and Federal Orders or as between producers under those Orders.

In view of the joint program and joint sources of authority for cooperative payments the relief sought by petitioners cannot properly be granted, as they ask, against the Secretary alone. To invalidate the Federal Order would make inoperative the State Order. Nevertheless, the petitioners at all stages have refused to recognize the joint nature of the program and have directed their attack solely against the Secretary. The petitioners make no issue as to the validity of the State Order, presumably because the New York State law in specific terms provides for cooperative payments (L. 1937, ch. 383 and L. 1939, ch. 760; McKinney's Consolidated Laws, Book 2-B, § 258-m (10) and (11)). In consequence of petitioners' position the District Court held (R. 176) that the right and power of the State Commissioner to do what he did as regards cooperative payments is not in issue.

In this aspect of joint State-Federal program and joint sources of statutory authority for unsegregated cooperative payments, the New York Order differs wholly from the Boston Order and the Court of Ap-

peals decision does not conflict with the decision of this Court in the *Stark* case.

b. *The Order Provisions.*—This Court pointed out in the *Stark* case that the New York Order expressly requires that a qualified cooperative must arrange for and supply, in times of short supply, class I milk to the marketing area, and must secure utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers (p. 461, n. 12); likewise that cooperatives must have sufficient plant capacity to receive all the milk of producers who are members, and must be willing and able to receive milk from producers not members. The Boston Order contained no such provisions. The present New York Order, as the Court of Appeals held, has essentially corresponding provisions.

In the *Stark* case this Court also pointed out that in the Boston Order the services for which payment was made, were for the direct benefit of cooperatives' members and but incidentally helpful to other producers. Further, performance of the services was not a required condition to receipt of the payments (p. 464).

Here the facts are to the contrary. All producers, not merely cooperative members, receive the value of the marketwide services (R. 114). The New York Order requires that these services be performed. Constant scrutiny of such performance is made mandatory by the Order and regulations thereunder (R. 118, 120, 3170-3176, 3164; 19 F.R. 3415-3417).

Petitioners argue (Pet. p. 9) that the marketwide services are not for the benefit of all producers since the Order requirements for such services do not on

their face recite that they are to be performed for non-members. The Court of Appeals held " . . . the marketwide nature and effect of the services to be performed by the cooperatives appear plainly from the text of the Order . . ."

The New York and Boston Orders radically differ in both their legal and factual bases, and the narrow decision of the Court of Appeals as to the New York Order is not in conflict with the decision of this Court as to the Boston Order.

3. The Decision Below Is Clearly Correct.

The main basis for the decision of this Court in the *Stark* case was as follows:

The cooperative payment provisions were not incidental to, but inconsistent with, other terms and conditions for milk orders, inasmuch as the cooperative payments resulted in handlers not paying uniform prices for each class of milk and in producers not receiving uniform prices for their milk delivered. "This is true," this Court said, "because non-members are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price." Such result follows for the reason that "the services for which the payment is made are performed for the direct benefit of the cooperatives' memberships, are but incidentally helpful to other producers, and are not a required condition to receipt of the payments."

These conclusions were factual conclusions as to the Boston Order situation. The New York Order situation requires its own separate analysis of the facts. This Court does not ordinarily grant certiorari

where the decision turns upon an analysis of the particular facts involved. The facts found by the Secretary and substantiated by both the District Court and the Court of Appeals negative any conclusion either that members of cooperatives receive the cooperative payments in addition to the blended price while nonmembers do not, or that the marketwide services are not required to be performed. Also the findings are that "the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk" (R. 119). The District Court said (R. 181):

> "The very foundation of the Act as a whole is to secure a uniform price to all milk producers. The entire purpose of the Act fails if members of qualified cooperatives receive a lower price for their milk than non-members. Without the payment for the required marketwide services performed by the qualified cooperatives, there would exist a disparity in the blended price received by members of qualified cooperatives and non-members. . . . Therefore, to not deduct the amount paid qualified cooperatives would be inconsistent with the very wording of the statute and would violate the 'following terms and conditions' which require uniform prices to all producers and associations of producers for their milk."

The Court of Appeals affirmed this conclusion, stating:

> ". . . Uniformity in the price received by producers is not destroyed by such payments. On the contrary, the findings are that the services for which they are made are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost. Further, it is found that the cooperatives incur expenses in the performance of

these marketwide services at least equal to the amount received from the fund. If the payments were for services beneficial only to members of the associations the case would be different. But they are for the benefit of non-members as well, and they are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted."

This Court has held that it will not undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 and cases cited; adhered to on rehearing, 339 U.S. 605. Here no such showing has been made. On the contrary, petitioners' position appears to be that the proper application of the statute is to be determined *in vacuo* irrespective of the facts and uncontroverted findings.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute, administrative order, and findings involved	3
Statement	3
Argument	14
Conclusion	25
Appendix	26

CITATIONS

Cases:	
Brannan v. *Stark*, 342 U. S. 451	6, 8, 14, 15, 16, 18, 20, 21, 22
Green Valley Creamery v. *United States*, 108 F. 2d 342	24
Queensboro Farm Products v. *Wickard*, 137 F. 2d 969	24
United States v. *Rock Royal Cooperative*, 307 U. S. 533	24
Statutes, Administrative Order, and Regulations:	
Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601, *et seq*	3
Section 8c (5)	14
Section 8c (5) (A)	16
Section 8c (5) (B)	6, 16, 19
Section 8c (7) (D)	14
Section 10 (i)	4
Agriculture and Markets Law of New York, Article 21, Section 258–r	4
Order No. 27, 7 C. F. R. 927.1 *et seq*	3, 23
7 C. F. R. 927.40–927.44	7
7 C. F. R. 927.60–927.67	7
Sec. 927.76, as amended, 18 F. R. 7224, *et seq*	3, 7, 8, 9, 11, 20
6 F. R. 3762	15
19 F. R. 3415	7

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 697

OSCAR L. GRANT, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 175–183), and a supplemental opinion of that court (R. 219–222), are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 26–38) is not yet reported.[2]

[1] The letter "R." is used to refer to the printed Joint Appendix, consisting of seven volumes, filed in the court below and presently filed with this Court. The pagination appears at the bottom of each page.

[2] The abbreviation "App." is used to refer to the Appendix to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1955 (App. 39). The petition for writ of certiorari was filed on February 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The primary provisions in the New York milk order issued by the Secretary of Agriculture relate to the pooling and pricing of milk, and auxiliary provisions in the milk order provide for payments to be made to certain cooperative associations of producers for the performance of specified market-wide services which, as found by the Secretary, are "worth more to each producer than the small amount paid to the cooperatives for the performance of the market-wide services" and the cooperatives necessarily "incur expenses in the performance of these market-wide services at least equal to the amount thus received from the producer-settlement fund." Also the order requires that a cooperative which receives the payments assess its members at least one cent per hundredweight of milk delivered by them, to pay the entire cost of the activities and operations of the cooperative which are not of market-wide character.

The question presented is whether the provisions for payments to cooperatives for the performance of specific market-wide services—as

provided in the Secretary's order, an order that is complementary to an identical order by the Commissioner of Agriculture and Markets of the State of New York—are within the statutory authority of the Secretary under the Agricultural Marketing Agreement Act of 1937.

STATUTE, ADMINISTRATIVE ORDER, AND FINDINGS INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601, *et seq.*, are set forth in the Appendix to the petition for writ of certiorari at pages 1–7. The pertinent provisions of Order No. 27 (7 C. F. R. § 927.1, *et seq.*), which became effective on September 1, 1938, are set forth in said Appendix at pages 7–12. The pertinent provisions of Section 927.76 of that order, as amended effective December 16, 1953 (18 F. R. 7224, *et seq.*), are set forth in said Appendix at pages 12–26. The findings made by the Secretary of Agriculture when the New York milk marketing order was amended in 1953 are set forth in the Appendix to this brief, *infra*, pp. 26–66.

STATEMENT

Petitioners are five milk producers, not members of any cooperative[2] eligible to receive payments under Order No. 27 (R. 2, 5, 184). They

[2] The word "cooperative" is used in this brief to mean a cooperative association of milk producers or a federation of cooperatives.

instituted this action against the Secretary of Agriculture in March 1952, on behalf of themselves and of other similarly situated producers, challenging the validity of the provisions of the Order authorizing payments to cooperatives (R. 2–16). Following the 1953 amendment of the challenged provisions, the complaint was supplemented to bring the amended provisions within its scope (R. 136–139).

The Commissioner of Agriculture and Markets for the State of New York was allowed to intervene as a party defendant (R. 58). The basis for intervention was that Order No. 27, as originally issued and as subsequently amended, was in effectuation of a joint Federal-State program for regulating the marketing of milk in the New York Metropolitan Area (R. 50–51),[4] which joint program is authorized by Section 10 (i) of the Agricultural Marketing Agreement Act (7 U. S. C. 610 (i)) and Article 21, Section 258-n of the Agriculture and Markets law of New York. The court also permitted 68 cooperatives and two federations of cooperatives to intervene as parties defendant (R. 46, 224, 226).

[4] The joint program involved joint public hearings prior to issuance of the Order and each amendment thereof; issuance by the New York Commissioner of a milk marketing order, to be effective simultaneously with Order No. 27, containing regulatory provisions which, so far as relevant to the present action, are identical with those of Order No. 27; and administration of both orders by a single Market Administrator jointly appointed by the Secretary and the Commissioner (R. 50–51, 186–188).

The transcript of the public hearings on the protested provisions of Order No. 27 was introduced in evidence. The district court rendered an opinion holding that the Secretary's findings relating to these provisions had substantial evidentiary support and that, in the light of these findings, the provisions for payments to cooperatives were authorized by the statute (R. 175–183). The court filed detailed findings of fact (R. 183–215), and entered a judgment of dismissal (R. 226). The judgment vacated the preliminary injunction (entered in April 1952) providing that part of the sums payable to cooperatives under Order No. 27 be held in escrow, but the court stayed, pending appeal, its vacation of the preliminary injunction (R. 28–31, 226–227). The court of appeals affirmed the district court's judgment, but it kept alive, pending final disposition of the cause by this Court, the payments into an escrow fund required by the district court's preliminary injunction (App. 39–41).

The appellate court's opinion, written by Circuit Judge Fahy, pointed out that the Secretary had found that the required payments to cooperatives were in return for services which "are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost", and that the cooperatives in performing these services incur expenses "at least equal to" the payments they receive (App. 33–34). The court

stated that the services performed "are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted" (App. 34). It declared that the facts in *Brannan* v. *Stark*, 342 U. S. 451, were "critically different" from those in the instant case (*ibid.*), and that the *Stark* decision is not only not hostile to, but "in some respects supports", the court's conclusion that the challenged provisions of the New York milk order are authorized by the statute (App. 38).

Circuit Judge Prettyman in his dissenting opinion stated that he would agree entirely with the majority decision were it not for his inability to distinguish the case from *Brannan* v. *Stark* (App. 38–39).

As required by Section 8c (5) (B) of the Agricultural Marketing Agreement Act, Order No. 27 provides for payment of a uniform price to all producers, irrespective of the use made of the milk by the individual handler (i. e., dealer or processor) to whom it was delivered. The basic provisions of the order designed to accomplish this are: Each month the Market Administrator computes the total value of the milk marketed in the area. This value is determined by multiplying the quantity of milk of each Class

by its class price as fixed by the order.[5] This total value is then adjusted by making certain additions and subtractions, one of the subtractions being the payments required to be made to cooperatives. Dividing the total value, so adjusted, by the total quantity of milk marketed in the area gives the uniform price payable to all producers. 7 C. F. R. 927.40–927.44, 927.60–927.67.

The order does not authorize payments to all cooperatives, but only to those performing the obligations which qualify a cooperative to receive payments. The required market-wide services are also under the constant supervision of the Market Administrator,[6] and he shall disqualify a cooperative, and discontinue payments to it, if he finds that it is in default in performing these services (927.76 (g) (1), App. 23–24).[7] In addition a cooperative must, in accordance with the regulations issued by the Market Administrator, demonstrate to him from time to time

[5] The milk's Class depends upon the use made of it, milk sold as fluid milk having the highest class price.

[6] See regulations issued by the Market Administrator with respect to cooperative payments for market-wide services (19 F. R. 3415).

[7] The order in effect prior to 1953 likewise provided that whenever the Market Administrator had reason to believe that a qualified cooperative is failing to perform the obligations covered by the authorized payments, "he shall suspend and hold in reserve such payments" until the Secretary has, after hearing, "ruled upon the performance of the cooperative" (App. 10–11).

that it "is fully performing the market-wide services for which it is being paid" (927.76 (d), App. 19).

Under the order in effect until December 16, 1953, the "services to the market" which a cooperative had to perform embraced supplying fluid milk to the marketing area in times of short supply "in a manner commensurate with the [its] marketing capacity", and "securing utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers" (App. 10).[8]

These obligations are continued in the order as amended in 1953. It provides that a cooperative will be disqualified and payments to it discontinued if the Market Administrator determines that it has failed, promptly after demand by him, "to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification" (927.76 (g) (1) (iii), App. 23–24). The amended order also provides that a cooperative which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of Section 927.76 shall

[8] In *Brannan* v. *Stark* this Court referred to these express requirements of the New York Order, in "contrast" to the Boston Order, which the Court viewed as not requiring cooperatives to take any action directed toward solution of the problem of surplus milk. 342 U. S. 451, 461, and n. 12.

operate marketing facilities, *i. e.*, a pool plant or plants, which receive at least 25% of the milk marketed by its members (927.76 (e) (6), App. 20).

Under the order as amended in 1953 payment was to be made to a cooperative only if it performed, and agreed to perform (927.76 (b), App. 15), the following additional "market-wide services" (927.76 (e), App. 19–20):

> (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data;
>
> (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions;
>
> (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments;
>
> (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations

issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter;

(5) conducting a comprehensive educational program among producers—i. e., members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and hold meetings at which members and non-members may attend;

The 1953 change in the cooperative-payment provisions of the Order was made following a hearing on proposed changes in these provisions (*infra*, p. 26). The transcript of the testimony at this hearing was more than 1700 pages and numerous exhibits were introduced (*infra*, p. 27). Prior to the hearing the Department of Agriculture and the New York State Department of Agriculture and Markets had appointed a committee composed of ten economists and marketing experts (all college or university professors or assistant professors) familiar with the problems of marketing milk in the milkshed serving the New York metropolitan area, to make an independent study of cooperatives in relation to Order

No. 27 (*infra*, p. 30). At the hearing, a large part of the evidence consisted of the committee's recommendations and testimony and supporting data submitted by its members (*infra*, p. 32). Following the hearing, the Assistant Administrator of the Production and Marketing Administration filed a recommended decision and written exceptions were filed (*infra*, pp. 27–28). The Secretary reviewed and considered these exceptions and the record at the hearing, before making his own findings and before approving revision of Section 927.76 of the Order (*infra*, p. 29, App. 12–13).

The findings made by the Secretary are comprehensive, and include the following:

There are approximately 50,000 milk producers in the six-state milkshed serving the New York metropolitan area. This is not a sharply chiseled and segregated milkshed but it is overlapped and interlaced with the milksheds of the major cities of the northeast. There are therefore greater complications in pricing and supply than anywhere else in the United States. Price-fixing under the New York Order is never static. Frequent hearings on proposed amendments are necessary and during the period 1938–1949 more than 200 changes were made in the order's regulatory provisions, on 53 different occasions. (*Infra*, pp. 32, 34–35.)

The 50,000 individual producers are not able to attend the numerous and protracted hearings on proposed amendments, and they do not indi-

vidually have the data necessary to effective representation of their interests at such hearings. Nor is the individual producer able to submit relevant, comprehensive evidence with respect to the variable and diverse situations requiring prompt amendatory action (*infra*, pp. 32–33).

The interests and viewpoints of the proprietary handlers—a small group—are always well represented and, in the absence of alert and informed participation by producers the program would become one-sided (*infra*, p. 35). Such producer participation is essential to maintenance of effective regulation (*ibid.*). The statutory objective cannot be achieved unless producers actively participate in the formulation and operation of the Order and amendments to it (*ibid.*). Such active participation is feasible only by means of cooperatives (*infra*, p. 37). These associations of producers give constant attention to the various marketing and economic problems in the industry, actively participate in the hearings and other aspects of the Order's operation, and contribute in far-reaching respects to solution of the problems which must be solved (*infra*, p. 34).

Unless the Order provides for payment to cooperatives, the cost of the market-wide services which they render must be borne exclusively by their members, with resulting disparity between members and nonmembers. The services which cooperatives perform "are necessary services which are of distinct and far-reaching benefit to

producers who otherwise would be without effective representation." "All producers receive the value of such market-wide services and all producers should, under this regulatory program, pay for them on the same pro rata basis without regard to" membership or non-membership in a cooperative. "The Order applies to and benefits all producers", and not merely those who are members of cooperatives. (*Infra*, pp. 40–42.)

"The value to all producers of the performance of the market-wide services [performed by cooperatives] will at least equal the amount of the payments to the cooperatives" (*infra*, p. 52). "The cooperatives incur expenses in the performance of these market-wide services at least equal to the amount" payable to them under the amended order,[9] and "inasmuch as the payments are for the performance of market-wide services the payments are not for milk, but are for services, and thus the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk" (*infra*, pp. 54, 55).

Cooperatives which operate marketing facilities, i. e., pool plants, "render services to the market as a whole" (*infra*, p. 51). They perform "market-wide service with respect to the maintenance of manufacturing plants for surplus milk", and their plants "are generally operated

[9] The payments to cooperatives represent about $25 for each producer in the milkshed (*infra*, p. 54).

more intermittently and at greater financial burden than similar plants operated by proprietary handlers" (*infra*, pp. 43, 44).

The terms and conditions of the provisions of the order for payment to cooperatives "are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of Section 8c of the Act (7 U. S. C. Secs. 608c (5)–(7)) and necessary to effectuate the other provisions of the order" (App. 13).

ARGUMENT

I

Section 8c (5) of the Act provides that milk marketing orders shall contain one or more of certain enumerated terms and conditions, "and (except as provided in subsection (7)) no others". Subsection (7) (D) provides that a marketing order may contain terms or conditions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." *Brannan* v. *Stark*, 342 U. S. 451, held that the cooperative-payment provisions of the Secretary's Boston milk order were not authorized by the statute because they were not incidental to, and were inconsistent with, the terms and conditions specified in subsection (5).[20] The principal question raised by the petition for

[20] Subsection (6) and subsection (7), other than (D) thereof, were irrelevant to the issue before the Court.

certiorari is whether the decision below is in conflict with this Court's decision in the *Stark* case.

The only findings of the Secretary, relating to the required payments to cooperatives, which were made in 1941 when the Boston Order was amended to provide for such payments, were that the payments "are incidental to, not inconsistent with, the other provisions of the order" and "necessary to effectuate" its other provisions, and that all of the terms and conditions of the amended order "will tend to effectuate the declared policy of the act." 6 F. R. 3762. See also Government brief in this Court in *Stark* case, pp. 95–96. Since these findings represented ultimate conclusions and did not show their factual foundation, this Court, on judicial review of the order, had to determine for itself the material facts.

The Boston order provided that cooperatives, to qualify for payments, had to meet eight requirements.[11] This Court said that none of them indicated that the activity it prescribed would benefit nonmembers, "with the possible exception of the seventh", and that the seventh does not support the provision for payment to cooperatives, which "concededly is based mainly upon other services" required by the order. 342 U. S. 459–460.

The Court held the cooperative-payment provisions not within authority conferred by 8c (7)

[11] The requirements are quoted in full in the *Stark* opinion, 342 U. S. note 9 at p. 459.

(D) upon the ground that they were inconsistent with the terms and conditions of Section 8c (5) (A), which provides that all handlers shall pay uniform prices for each class of milk, and also inconsistent with Section 8c (5) (B), which requires payment of uniform prices to all producers for all milk delivered. *Id.*, 463.

Although the Boston order provided that all handlers pay a uniform price for each class of milk, this Court concluded that the cooperatives which operated processing plants, and thus were "handlers", paid a lower price for their milk than did proprietary handlers, because the order provided for certain payments to cooperatives out of the producer settlement fund. *Id.*, 463. Since the Court concluded that the cooperatives were not required to perform, as a condition to receiving these payments, any service of benefit to the market as a whole (*id.*, 460–461), the payments were viewed as reducing the price which the cooperatives (operating as handlers) paid for the milk which they purchased, contrary to the terms and conditions of Section 8c (5) (A).

The Boston order established a uniform price payable to all producers for the milk they delivered, as required by Section 8c (5) (B), and the payment to cooperatives was simply one of the factors entering into computation of uniform price. But the Court concluded that the cooperative-payment provisions of the order resulted in cooperative members obtaining more for their

milk than nonmembers, and that these provisions were therefore inconsistent with Section 8c (5) (B). The Court reasoned that a member received, through his cooperative, the uniform price and, in addition, benefited individually from the payment to his cooperative, and this payment was deemed in the nature of a gratuity because the services performed as a condition to payment were, for all practical purposes, solely for the benefit of the members. *Id.*, 463–464.

The conclusion that the payments to cooperatives were inconsistent with the terms and conditions of Section 8c (5) (A) and 8c (5) (B) necessarily meant that the payments were also not "incidental" to these terms and conditions. *Id.*, 463.

In the present case, however, both the district court and the court of appeals have ruled that the Secretary's findings are supported by substantial evidence, and the petition for certiorari raises no question as to the correctness of this ruling. The findings abundantly and affirmatively establish the very factors the absence of which led this Court to invalidate the cooperative-payment provisions of the Boston order. The findings establish that the cooperatives who receive payments under the New York order perform, and are required to perform, services of basic importance to the operation of the order, that these services benefit all producers, and that

the cooperatives give full *quid pro quo* for the payments which they receive (*supra,* pp. 12–14).

Although the findings on which we rely were made in conjunction with the 1953 amendment to the order, they were based on evidence showing the conditions existing in the market and milkshed prior to the administrative hearing held in January and February 1953 (R. 2112). The findings set forth long-standing marketing conditions in this milkshed, and are as applicable to the period from March 1952 (when this action was instituted) to December 1953 as to the period subsequent to December 1953.

We submit that, under the findings, the provisions of the New York order for payments to cooperatives are consistent with and relevant to, and serve to effectuate, the terms and conditions of Section 8c (5), as that section was construed in relation to payments to cooperatives in *Brannan* v. *Stark.* What was there held was that when a cooperative receives payment out of the producer settlement fund on account of services rendered only to its members, they thereby get these services free and, in effect, receive a higher price for their milk than nonmembers, contrary to the command of Section 8c (5) (B). On the same reasoning, if a cooperative performs services benefiting all producers alike and only its members bear the cost of this service, they receive *less* for their milk than nonmembers, contrary to the command of 8c (5) (B). Payment to the

cooperative out of the producer settlement fund equally distributes the cost of the service among all producers and accordingly effectuates what 8c (5) (B) requires, that a uniform price be paid to all producers.

The New York order requires genuine, not *pro forma,* market-wide services. Under the 1953 amendment payment is made only to a cooperative or federation of cooperatives having not less than 4,000 members, with an additional payment to a cooperative or federation having not less than 6,000 members (App. 15–17). The reasons for these minimum-membership provisions are set forth in the Secretary's findings. He found that the required market-wide services can be performed more effectively and at less expense by a large organization able to hire well qualified experts and to undertake extensive research; that such an organization, having members with diversified interests, is more representative of producers as a whole; and that a small cooperative could retain its identity and participate in the marketing program by federating with other cooperatives (R. 117).

We have discussed the provisions of the marketing order in effect subsequent to December 1953 for the purpose of showing that the decision below sustaining the validity of these provisions is not in conflict with the decision of this Court in the *Stark* case. We think it equally clear that the decision below, as it applies to the

provisions in effect prior to December 1953, is also not in conflict with the *Stark* decision.

The services required of cooperatives prior to the 1953 amendment primarily related to the milk marketing problems growing out of the seasonal character of milk production. Herds sufficient to meet the demand for fluid milk during winter months produce much more than enough to satisfy demand during summer months, and to prevent reduction of herds below the point necessary to supply demand in the season of low production, there must be an outlet, through manufacture of milk products, for "surplus" milk in the period of flush production. *Stark* case, 342 U. S. at 460.

Under the New York order in effect until December 16, 1953, payment was made only to cooperatives "arranging for and supplying, * * * in times of short supply, Class I milk to the marketing area", and "securing utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers" (App. 10).[12] In the *Stark* case this Court called attention to the fact that the Boston order contained

[12] The order, as amended in 1953, likewise imposes the latter requirement. It provides that the market administrator shall wholly or partly disqualify a cooperative, and that payments to it shall not thereafter be made, if he determines that it has failed, promptly after his demand, "to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification" (927.76 (g) (1) (iii), App. 23–24).

no like requirements, observed that their omission "presumably was deliberate", and emphasized that "the cooperatives in the Boston area were unwilling or unable to perform services such as those required by the New York Order." 342 U. S., note 12 at p. 461. This Court, having itself distinguished the facts on which it based its decision in *Stark* from those in the instant case, validation of the New York order and invalidation of the Boston order does not involve a conflict in decision.

In the present case the court below said that the requirements of the New York order which were referred to in the *Stark* opinion as standing in contrast with the absence of like requirements in the Boston order "are essentially retained and even made more specific by the 1953 amendments to the Order" (App. 37). The court below also said that "the 1953 amendments made no material change" in the prior requirement of the New York order that cooperatives "dispose of milk in such a way that all producers will benefit" (App. 38). The court below further said in this connection: "The Secretary found that the cooperatives perform a marketwide service in acting so as to assure the most desirable class utilization of milk, and the statements made by the Supreme Court in the *Stark* case indicate it would concur in that view" (*ibid.*).

II

Petitioners contend that, if this case is not governed by *Brannan* v. *Stark*, it presents an important question of federal law which has not been, but should be, decided by this Court. But what the case essentially involves is the application of the statute to particular provisions of a particular marketing order under particular findings of fact.[13] Not only did the Secretary find that the conditions and problems related to and affecting the New York order are "unique" (*infra*, p. 34), but the New York order is the only one of 64 outstanding milk orders providing for like payments to cooperatives.[14]

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[13] The pertinent provisions of the order cover some 16 pages as printed in the appendix to the petition for certiorari (App. 10–26). The findings of the Secretary as printed in the appendix to this brief cover 41 pages.

[14] In the *Stark* case this Court noted that of 39 then outstanding milk orders only four (including the Boston and New York orders) contain "provisions of the general nature of those in question." 342 U. S., note 19, p. 466. Following the *Stark* decision, the Secretary terminated the cooperative payment provisions of three of these orders (those of Greater Boston, Cincinnati, and Dayton-Springfield) upon the ground that they were governed by the decision in the *Stark* case (R. 3168–70). At the same time he announced that he would not terminate the cooperative payment provisions of the New York order, for the reason that he had been advised by the Solicitor General of the United States and the Solicitor of the Department of Agriculture that, because of the "substantially different conditions of eligibility" under this order as compared with the Boston order, the provisions of the New York order were not invalidated by the *Stark* decision (R. 3168).

We have here administrative action bearing every indicium of careful and tempered consideration, taken in the light of the principles which this Court laid down in *Brannan* v. *Stark,* and based in major part on recommendations resulting from a study made by a committee of recognized, disinterested experts. The case comes before this Court following decision by both the district court and the court of appeals that the administrative action complies with the law and is not in conflict with the *Stark* case.

III

Petitioners contend that, in any event, the contested provisions of the order are not authorized by the statute. The basis for this contention seems to be that, because Section 8c (5) contains certain specific directions or requirements as to milk marketing orders, but is silent as to provisions of the kind here involved, the Secretary is impliedly prohibited from adopting these provisions pursuant to the authority given him by Section 8c (7) (D), to include in a marketing order terms and conditions "necessary to effectuate the other provisions of such order."

Even a cursory examination of the New York order, which occupies 38 double-column pages as printed in the Code of Federal Regulations (7 C. F. R. 927.1–927.353), shows how elaborate, detailed and varied the provisions of this order are. Yet authority for the order rests primarily

on Section 8c (5) of the Act, which is set forth in less than three pages of the appendix to the petition for certiorari (App. 2–4). Congress has framed in general terms the policy to be pursued and has left to administrative action the task of implementing this policy. While the administrator of the Act must stay within the confines of the course charted by Congress, he must be allowed reasonable flexibility in choice of means for effectuation of the statutory provisions. See *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 574, 575–576; *Queensboro Farm Products* v. *Wickard,* 137 F. 2d 969, 979 (C. A. 2); *Green Valley Creamery* v. *United States,* 108 F. 2d 342, 345 (C. A. 1).[15]

The findings of the Secretary show, perhaps even redundantly, that the provisions of the order for payment to cooperatives are "necessary to effectuate the other provisions" of the order. If, therefore, we are correct in believing that these provisions do not run counter to any prohibition of the Act (see Point I, *supra*), they clearly fall within the authority conferred upon the Secretary by Section 8c (7) (D).

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[15] In the *Green Valley* case the court said that the Act "does not specify the detailed method by which a blended or uniform price is to be computed", and it held that a required adjustment in computation of uniform price is valid if it appears to be "reasonably adapted to promoting the successful operation of the equalization pool".

CONCLUSION

The decision below is not in conflict with *Brannan* v. *Stark* and it turns on administrative action, based upon detailed administrative findings, which have been reviewed and found to be valid by two lower courts. It is respectfully submitted that the petition for writ of certiorari should be denied.

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MARCH 1956.

APPENDIX

The following is the Decision by Ezra Taft Benson, Secretary of Agriculture of the United States, with respect to the cooperative payment provisions, for market-wide services, filed on October 7, 1953 (18 F. R. 6458 *et seq.*):

Preliminary Statement

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*), and the applicable rules of practice and procedure, as amended, governing proceedings to formulate marketing agreements and marketing orders (7 CFR Part 900), and in accordance with the notice of hearing issued on December 24, 1952 (18 F. R. 43), a public hearing was held at Syracuse, New York, on January 22–23, 1953, and on February 16–21, 1953, upon certain proposed amendments to the tentative marketing agreement and to the order, as amended, regulating the handling of milk in the New York metropolitan milk marketing area (7 CFR 927.1 *et seq.*).

The hearing was held with respect to whether the milk marketing order, as amended, for the New York metropolitan marketing area should continue to provide payments, from the producer-settlement fund, to co-operative associations of producers for market-wide services, and, if so, the changes, if any, which should be made in the present provisions of the order, as amended, under which the payments are

authorized for market-wide services. A marketing agreement has never been executed with respect to this program but the hearing relates also to the provisions in the tentative marketing agreement that are comparable to the co-operative payment provisions in the order, as amended. The term "order," as used in this decision, means the order, as amended, regulating the handling of milk in the New York metropolitan milk marketing area (7 CFR 927.1 *et seq.*) pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*).

The transcript of the testimony at the hearing consists of more than 1700 pages and numerous exhibits. Subsequent to the hearing, some of the interested parties filed with the Hearing Clerk proposed findings and conclusions and written arguments or briefs with respect to the evidence adduced at the hearing.

Rulings

Upon the basis of the evidence introduced at the hearing and the record thereof, the Assistant Administrator, Production and Marketing Administration, on August 17, 1953, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision in this proceeding. The notice of filing of such recommended decision and opportunity to file written exceptions thereto was published in the Federal Register on August 21, 1953 (18 F. R. 4998). The rulings contained in the recommended decision on the proposed findings and conclusions submitted by interested parties are hereby confirmed.

Careful consideration has been given to all of the exceptions filed in this proceeding, and these exceptions, together with requested findings and conclusions associated therewith, are hereby denied to the extent to which they are at variance with the findings and conclusions herein set forth.

One exception relates to whether the Secretary's decision should be "final" with respect to a ruling by the Market Administrator on the qualification or disqualification of a co-operative or federation. A slight change has been made to make it clear that the Secretary's decision, in that respect, constitutes final administrative action and that judicial review, if such is appropriate and available, is not precluded and may be obtained in accordance with the appropriate procedure, including a petition under Sec. 8c (15) (A) of the statute if such is requisite to judicial review.

It is asserted in some of the exceptions that the decision of the Supreme Court in *Brannan* v. *Stark,* 342 U. S. 451, precludes payments to co-operatives for market-wide services, such as those provided for in the amendment to the order as set forth in this decision. But the Court's opinion in *Brannan* v. *Stark* relates to an order in another market, and the evidentiary facts and provisions in that case are significantly different, in various respects, from those involved in this rule-making proceeding. It is concluded, after careful consideration of that case, that the provisions for co-operative payments for market-wide services, as provided for in the amendment to the order as hereinafter set forth, are authorized by the statute and are supported by

the extensive and strong record of the evidence in this proceeding.

Some of the exceptions relate, in general, to the evidentiary foundation for findings that were set forth in the recommended decision. These exceptions, as well as all other exceptions, have been carefully considered in the light of a review and study of the record of the hearing. The findings hereinafter set forth are in such detail as to reveal our resolution of all these issues.

Findings and Conclusions

The following findings and conclusions have been arrived at after a careful review and consideration of the record of the hearing, the briefs, including the proposed findings and conclusions, and the exceptions; and all the following findings and conclusions are based on the evidence adduced at the hearing. The findings and conclusions are in detail so as to reveal and include the reasons or basis for the findings and conclusions with respect to all of the material issues of fact, law, or discretion presented on the record of the hearing. The findings and conclusions are as follows:

The regulatory program for the New York metropolitan marketing area is a joint Federal-State program. The Federal order and the State order are complementary, and both orders contain, in all material respects, identical provisions. In the case of the original promulgation of the orders, and each amendment to the orders, joint hearings have been held and the amendments to both orders have been identical in all material respects. This program has been administered in accordance with the principles of procedure set forth in the agree-

ment or memorandum of understanding executed on August 26, 1938, by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York.

Several months prior to the hearing, the United States Department of Agriculture and the New York State Department of Agriculture and Markets appointed a committee of experts, in the field of milk marketing, to make an independent study of co-operative associations of producers in relation to the Federal-State milk marketing order for the New York metropolitan area. G. W. Hedlund, Professor of Business Management and Acting Head of the Department of Agricultural Economics, New York State College of Agriculture, served as chairman of the Committee. Dr. Hedlund is a specialist in the field of co-operative organization. The other members of the committee are Thurston M. Adams, Acting Associate Dean and Director, University of Vermont and State Agricultural College; C. A. Becker, Professor of Agricultural Business Management, Pennsylvania State College; L. C. Cunningham, Professor of Farm Management, New York State College of Agriculture; Steward Johnson, Professor of Agricultural Economics, University of Connecticut; C. W. Pierce, Professor of Agricultural Economics, Pennsylvania State College; Leland Spencer, Professor of Marketing, New York State College of Agriculture; Herbert G. Spindler, Assistant Research Professor, University of Massachusetts; R. P. Story, Assistant Professor of Marketing, New York State College of Agriculture; and Allen G. Waller, Chairman, Department of Agricultural Economics, Rutgers

University and Agricultural College. The members of the Committee are economists and marketing specialists and are familiar with milk marketing and its various problems throughout the milkshed for the New York metropolitan area

The subject before the Committee for investigation and study was given careful attention by the Committee. The Committee began its work by reviewing the relevant background material, including the provisions of the order, the records of the promulgation hearings on which the provisions of the order are based, and other related data. The Committee then outlined the services performed in the marketing of milk and considered three questions, viz: (1) What agencies or groups perform each service; (2) does a particular service benefit all producers or are the benefits confined to the membership of a co-operative association of producers; and (3) should a co-operative be paid, from the producer-settlement fund, for market-wide services performed by such co-operative. After the Committee had familiarized itself with all of the background material and had studied, among other things, the services by co-operative associations of producers, the Committee issued a public invitation to interested groups and persons, including those opposed to co-operative payments, to meet with the Committee. The Committee received many points of view and ideas from the various groups or segments of the industry. The Committee held numerous meetings for discussion and study, and two of the meetings were for a session of three days, two meetings were for a session of two days, and various meetings were for one day.

379707—56——3

The conclusions and recommendations of the Committee were submitted in evidence at the hearing, and various members of the Committee attended the hearing and testified. All of the members of the Committee are experts in this field, and their qualifications were not challenged at the hearing. A large part of the record consists of the testimony and supporting data submitted by the members of the Committee. Additional evidence was adduced by co-operative associations of producers, by handlers, and by producers who are not members of a co-operative association of producers.

Price-fixing under the milk order for the New York metropolitan marketing area is not static but requires constant attention and frequent hearings on proposed amendments. Also, marketing conditions require at times the suspension or termination of some of the provisions in the order. During the period from September 1938 to December 1949 more than 200 changes were made in the regulatory provisons of the order, and those changes were on 53 different occasions. Since December 1949 the order has been further amended at times and numerous changes made effective. Amendment hearings generally deal with involved and complex issues, and the records of such hearings are voluminous.

The milk supply for the New York metropolitan marketing area—the handling of which is regulated by the order—is produced by approximately 50,000 dairy producers located throughout a production area which includes portions of six states, and this milkshed extends more than 400 miles from the marketing area. The 50,000 individual producers are not generally situated so as to attend the numerous

and protracted hearings, and also individual producers do not have available the technicians and data necessary to an effective representation of their interest at such hearings. An individual producer is not able, with his limited means, to maintain the necessary staff to keep informed of current market conditions, initiate requests for amendatory action deemed necessary in the interest of producers, and be alert and informed with respect to the constantly changing circumstances in this highly complex field of milk marketing. It is not to be expected that an individual producer, with his limited means, would be able to represent himself effectively at amendment hearings or to submit relevant evidence in a comprehensive way with respect to the variable and diverse situations that arise, sometimes on short notice, and which must be met with dispatch by way of amendatory action. For example, the failure to amend class prices which are out of line with current market conditions results in the utilization of milk in uses which do not render the most favorable return to the producers, in the market-wide pool, who receive, under the Act and the order, a uniform blended price. If, as an illustration, the Class III price for milk is too high, ice cream manufacturers may discontinue the use of cream and use butter instead, which would return to producers, under the present order provisions, 14 cents per hundredweight less for their milk. But a small decrease in the Class III price might induce the ice cream manufacturers to use cream, and as a result all producers would benefit by the utilization of the milk in the manner most profitable to the producers under a market-wide pool whereby a

879707—56——4

uniform blended price is paid to producers for their milk. Although individual producers seldom attend the hearings or actively participate in the hearings in an effective way, nonetheless the vigorous and well organized co-operative associations of producers give constant attention to the various marketing and economic problems in the industry, and by active participation in the hearings and in other activities day by day in the operation of the program contribute, in significant and far-reaching respects, to the solution of the problems that must be resolved.

The factors of size, diversity of conditions, specialization among handlers, divergency of interests, and complexity of price structures make this milkshed and regulatory program unique. In recent years the value of milk priced under this program for the New York metropolitan marketing area has exceeded $300,000,000 annually. The volume of milk priced under the program approximated 7,000,000,000 pounds in 1952, or about ⅓ of all the milk regulated under the Federal programs regulating the handling of milk in most of the major metropolitan areas of the United States. This large volume of milk under the order is produced on farms in New York, New Jersey, Pennsylvania, Vermont, Connecticut, and Massachusetts. The area from which such milk is drawn is not a sharply chiseled and segregated milkshed but is overlapped and interlaced with the milksheds of the major cities in the northeast. Moreover, the milksheds for many large cities in the State of New York are wholly contained within the milkshed for the marketing area defined in the order. The overlapping of these milksheds causes compli-

cations in pricing and supply which are not present to the same degree elsewhere in the United States.

The wide range of conditions and interests in this extensive milkshed and the large volume of production and marketing of milk emphasize the pronounced need for active producer participation in this regulatory program. Inasmuch as the interests and viewpoints of the proprietary handlers —a small group—are always well represented at the hearings and in the other activities under this program, the absence of an alert and informed participation by the producers would give to the program a one-sided character that would, under the circumstances, preclude the attainment of the statutory goal. Moreover, the public has a direct interest in the proper formulation and administration of this regulatory program, and this public interest may be maintained only if all relevant market facts and circumstances are promptly developed and the large producer group is effectively represented in the functioning of the program.

Proper regulation may be made effective and maintained in effect only if the facts are fully and promptly developed and presented. This cannot be done in the absence of alert and informed participation by producers. This activity by producers is time consuming and expensive. In sharp contrast to some industries the dairy industry in this milkshed consists of thousands of relatively small producing units, *i. e.*, dairy farms, and the marketing of milk in this milkshed requires of necessity the consideration of a complex array of changing factors, such as sudden changes

in the supply and demand for milk caused by the weather.

Inasmuch as the provisions of the order must be based on the evidence adduced at a public hearing and the order must be amended from time to time to be relevant to current marketing conditions so as to effectuate the economic goal set forth in the statute and thus be in the public interest, it is of basic importance for there to be producer participation in the formulation and operation of the order and the amendments thereto to the end that the program may be predicated on a broad and comprehensive foundation and thereby provide for such regulation as may attain the Congressional purpose. Producer participation in the program is also conducive to an informed and proper consideration by the producers in the referenda under the statute. Alert and informed producer participation is essential throughout the entire regulatory process in this market, *e. g.*, in discerning the need for amendatory action and in making requests for amendment hearings, in participation at the hearings, in participation in the referenda among producers as to whether the program meets with the requisite producer approval as specified in the statute, and in the numerous and varied functions day by day in the marketing of milk, including in some instances requests for suspension or termination of certain regulatory requirements. Also, the producer groups should be prepared to present evidence on short notice at industry meetings, relative to the "call" provision, under Sec. 927.24 (g) of the milk order. Under this provision, the Market Administrator may, in designated circumstances, conduct an industry meeting for

the purpose of determining whether the market is adequately supplied with fluid milk and cream. If the Market Administrator determines that the market is not adequately supplied, he may require pool handlers to supply the market with fluid milk and cream. At such hearings, some fluid milk handlers may be motivated to contend that the market needs fluid milk, while at the same time the proprietary handlers engaged in manufacturing may be motivated to contend that there is an adequate supply of fluid milk and cream so that they can continue manufacturing milk products. The producer groups must be prepared, day by day, to give detailed evidence as to the market situation so that the total milk supply will be properly utilized, and result in the greatest return to all producers under the market-wide pool. In addition, producer participation is necessary at the public meetings called by the Market Administrator to consider rules and regulations for issuance under the order.

Active participation by producers in the regulation of milk marketing is feasible only by means of co-operative associations of producers. The dairy industry in this milkshed has had considerable experience with organizations or groups of producers operating as co-operative associations of producers since 1916. Prior to September 1, 1938, when this regulatory program became effective, collective bargaining between co-operative associations of producers and handlers was an accepted method for determining the price of milk. In addition, some co-operative associations have operated and continue to operate milk plants for handling surplus milk. The

order provides, among other things, for producers to receive a uniform minimum price for their milk, and after the order had been in effect for a fairly long period of time the tendency developed among some producers to regard the functioning of the order as an automatic operation. The producers, as a group, tended to withdraw support from the co-operative associations which spent time, effort, and money in protecting and fostering the interest of all producers in the milkshed. Also the general trend in recent years toward higher prices has caused some decrement in producer recognition of the need for strong co-operative associations of producers. The three principal organizations of producers in the milkshed now represent about 60% of all producers. But in 1940 one organization had as high a percentage of producers in its membership. The percentage of all producers in co-operative associations in the milkshed has decreased from 73.9% in 1940 to 70.4% in June 1952, and the percentage of all producers in federated co-operatives has decreased from 61% to 50.5% during the same period. The total number of co-operatives in the New York milkshed has decreased from 110 in 1940 to 91 in June 1952, and the number of such co-operatives qualified to receive co-operative payments under the New York order has decreased from 84 to 73 during that period. More than 14,000 producers—about 30% of the producer group in the milkshed—do not belong to any co-operative association of producers. The non-participating producers constitute a larger percentage of the total number of producers than they did when the order

became effective in 1938. The following synoptic table shows the number and membership of all co-operative associations of producers in the New York milkshed as of January 1940 and June 1952:

Group	Number of co-operatives		Number of members		Percent of all producers	
	Jan. 1940	June 1952	Jan. 1940	June 1952	Jan. 1940	June 1952
FEDERATED						
Bargaining	49	45	13,691	7,123	22.9	14.4
Bargaining & collecting	4	3	872	423	1.5	.9
Operating	13	20	21,946	17,426	36.6	35.2
Total federated	66	68	36,509	24,972	61.0	50.5
UNAFFILIATED						
Bargaining	18	5	3,585	6,239	6.0	12.6
Bargaining & collecting	2	1	268	78	.5	.2
Operating	24	17	3,850	3,523	6.4	7.1
Total unaffiliated	44	23	7,703	9,840	12.9	19.9
ALL CO-OPERATIVES						
Bargaining	67	50	17,276	13,362	28.9	27.0
Bargaining & collecting	6	4	1,140	501	1.9	1.0
Operating	37	37	25,796	20,949	43.1	42.4
Total co-operatives	110	91	44,212	34,812	73.9	70.4
Members of union-type organizations who were not members of co-operatives			15,627	1,402	26.1	2.8
Unorganized producers				13,265		26.8
All producers			59,839	49,479	100.0	100.0

In 25 milk markets throughout the country the percentage of all producers represented as of December 1951 in the co-operatives ranged from 39% to 100%. In 9 of the 25 milk markets more than 90% of the producers belong to co-operatives. The New York milkshed is one of the 9 areas in which less than 75% of the producers are members of a co-operative. Also in 9 of the 25 milksheds more than 80% of the producers are members of the largest co-operative. But the New York milkshed is one of the areas in which the membership of the largest co-operative comprises less than one-third of the pro-

ducers. In the New York milkshed the largest federation of co-operatives—including the largest co-operative in the milkshed—has in its membership only about 40% of the producers.

The relative strength of co-operative organizations and federations of co-operatives has declined somewhat since the New York milk order became effective in 1938. It appears that the present co-operative payment provisions of the order have been helpful, but have not entirely prevented this trend. The performance of essential market-wide services for the benefit of all producers in the market requires strong and vigorous co-operative associations or federations of co-operatives. The present provisions of the order providing for such payments should be improved and strengthened in various respects. Without co-operative payments the cost of the market-wide services rendered by co-operative associations and federations must be borne exclusively by their members, resulting in an unfair disparity between members and non-members. The impact on members of paying the cost of such market-wide services tends to discourage membership in co-operatives, and that tendency or discouragement thus impairs or prevents the development of the only means by which producers can be represented effectively. A failure to pay co-operative associations for services benefiting all producers would be contrary to long established public policy to encourage the development and expansion of co-operative associations of farmers as reflected in the relevant Acts of Congress, and to pay co-operatives, in the manner provided in the amendments

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contained herein, for services which they render in the interest of all producers is consistent with that established public policy.

Any payments to co-operatives for the performance of market-wide services should be borne equally by all producers and not merely by producers who are members of a particular group. Members of the participating co-operatives and nonmembers have equal interests in the producer-settlement fund, and their contribution to the cost of these market-wide services should be the same. All producers receive the value of such market-wide services, and all producers should, under this regulatory program, pay for them on the same pro rata basis without regard to whether or not they happen to be members of the co-operative associations which are performing the services. The situation is the same as would be the case if there were available some other equally qualified agency which could be engaged to perform the necessary services. Accordingly, payments should be made to co-operatives out of the producer-settlement fund for the performance of the market-wide services contained in the amendments set forth in the decision.

The members of the co-operatives are distributed throughout the entire milkshed, and the co-operatives are of various types and sizes. Some of the co-operatives operate milk plants, and others do not. To the extent that producers' interest in the classification, pricing, and pooling provisions of the order may differ, such differing interests are represented by the co-operatives and their members. The co-operatives include vast numbers of producers

whose interest in the order and in the milk marketing problems associated therewith is the same as the interest of producers otherwise similarly situated and interested but who are not members of co-operatives. Co-operatives as a group can and do represent the interests of producers generally in the various activities associated with the order which are necessary to its continuing effectiveness and to the protection of producer interests therein. The order applies to and benefits all producers, and not merely producers who are members of co-operative associations. The services which co-operative associations can and do perform in connection with the formulation and proper functioning of the order are necessary services which are of distinct and far-reaching benefit to producers who otherwise would be without effective representation.

The co-operative associations generally carry on many kinds of activities which are of market-wide value in the milkshed. These market-wide services by co-operative associations include: (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the Market Administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and pres-

entation of evidence at public hearings, the submission of appropriate briefs and exceptions and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the Market Administrator with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data and briefs for submission; (5) conducting a comprehensive educational program among producers—members and non-members of co-operatives—and keeping such producers well informed for participation in the regulatory program, and as a part of such program by issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend.

In addition to the foregoing services of market-wide character by co-operative associations of producers, some of the co-operatives, generally identified as operating co-operatives, perform market-wide service with respect to the maintenance of manufacturing plants for surplus milk. In this milkshed, with its wide seasonal and cyclical variations in supply, it is necessary to have these plants in order to insure an outlet for the milk produced for disposition as fluid milk in the marketing area. In order to avoid shortages during some of the time, it is necessary that the supply of milk for the marketing area should at all times exceed the minimum requirements of the fluid milk market. Whatever the minimum safety margin

may be, it is not possible to maintain that minimum in the fall and winter months without exceeding it in the spring and summer months owing to the seasonal variation in milk production. This economic imbalance in the production and marketing of milk presents a serious problem with respect to assuring an adequate supply of fluid milk throughout the year and of equitably disposing of the surplus milk. The order applies only to milk that handlers are willing to and do accept, and if producers are denied an outlet for their milk by proprietary handlers then the producers are faced with the uneconomic choice between dumping their milk or reducing their herds, unless outlets for their milk are provided by the co-operatives. Manufacturing facilities should be available to handle the surplus milk that cannot be utilized on the fluid milk market. Manufacturing facilities required to handle the surplus milk are not ordinarily required at other times of the year, and are maintained as standby facilities. These operations of manufacturing plants take care of both seasonal and week-end surpluses, and the operations include of necessity the storage and handling of dairy products manufactured from the surplus milk. Operating co-operatives have constructed and maintained these plants which are generally operated more intermittently and at greater financial burden than similar plants that are operated by proprietary handlers. The financial burden for maintaining these facilities for the disposal of surplus milk is a major handicap to some co-operatives.

The problem of surplus milk can, in some respects, be met by means of class pricing but in view of the rapidly changing

conditions in the market it is not possible to solve this problem solely by means of class prices. The market-wide services thus performed by maintaining plants for surplus milk could under some circumstances be performed by proprietary handlers who may be willing to perform this service. But the record of this hearing does not warrant a finding or conclusion that payments should, in this respect, be made to proprietary handlers. The subject is, however, one for further consideration, and may be presented at another hearing whenever appropriate. The payments to co-operatives, as provided for in the amendments hereinafter set forth, are the appropriate and necessary payments for the market-wide services which are performed only by co-operatives, and these services are necessary under the circumstances revealed in the record.

Co-operative associations of producers also perform a market-wide service in disposing of their milk so as to result in the highest net return to the pool, *i. e.*, producer-settlement fund. Of necessity the order fixes different class prices for the different uses of milk. Because the relationship of these class prices is not always in perfect balance due to rapidly changing market conditions, handlers may at times realize a greater margin of profit by using milk in the lower valued class uses as compared to the more valuable utilizations. By reason of the cooperative payment provisions which are presently in the order co-operatives have channeled the milk under their control into the utilizations most advantageous to the pool despite the loss to them of such greater profit margins, and the total value of the pool has been thereby

enhanced to the advantage of all producers. This market-wide service by the co-operatives is performed whenever their milk is thus disposed of in a higher priced class if, in fact, there is a market for milk in that higher utilization class without "bumping" other pool milk into a lower class.

The present co-operative payment provisions of the order require each participating co-operative, on its own initiative, to assure that the milk handled or controlled by it flows into and is utilized in channels that yield the highest net available return to the pool, *i. e.*, producer-settlement fund, and consequently to all producers. In actual application the co-operatives, and particularly the smaller bargaining co-operatives, have encountered some difficulty in ascertaining whether the utilization of their milk is in the class utilization which would give the highest overall return to the producer-settlement fund, and compliance with the present provisions by the participating co-operatives appears to have resulted at times in displacing other producer milk in the higher class utilizations without actually achieving a higher net utilization for the pool, while at the same time causing some unnecessary costs and shifting of normal uses of particular milk.

It was suggested during the hearing that better class pricing would more effectively solve this problem. But no milk pricing mechanism will automatically or constantly maintain the desirable relationships between class prices and bring about the most desirable utilization at all times, and no such device or method is available for the future. Accordingly, the provisions for co-operative payments for market-wide

services are necessary in view of the characteristics of the market, to achieve the goal of this program under Sec. 8c (18) of the statute.

Although the co-operatives and federations receiving the payments will be expected to keep a constant watch on relative class prices and to take prompt action to assure that appropriate amendatory or other action be proposed to restore proper pricing balances as soon as possible, amendments to the New York order cannot ordinarily be made effective without some delay. Some pricing disparities, by their very nature, are temporary, so that amendment of the order would not be feasible. A provision which would require co-operatives or federations to act in a practicable way to assure the most desirable class utilization of milk would provide interim protection to the pool until such disparities disappear or can be corrected.

Although the 1945 amendments to the order required pool handlers, in designated circumstances, to supply fluid milk and cream, such "call" provisions in Sec. 927.24 (g) of the order do not fully meet the problem of achieving the most desirable utilization of milk. The basic purpose of the call provisions is to assure a sufficient supply of fluid milk and cream to the market. Because of the complexities of the problem, the call provisions have been specifically limited to certain fluid milk and fluid cream classes, and do not cover all aspects of desirable utilization. Specified procedures also must be followed before the call milk provisions can be put into effect, leaving some inevitable time lags. In addition, the maximum percentages fixed for all pool plants with respect to speci-

fied class uses would not necessarily represent the total potential demand in each of such classes. Consequently, even in the limited field of "call milk" room remains for action by co-operatives to insure utilization most advantageous to the pool, *i. e.*, the producer-settlement fund.

The co-operative payment provisions, in that respect, appear to have worked somewhat automatically or unobtrusively and have substantially accomplished the purposes for which they were designed, although not always perfectly. It is concluded, however, that the same net result can be accomplished, while avoiding the undesirable incidental or side effects of the present provisions, by cutting off payments to participating co-operatives which persist in arranging for undesirable utilizations of their milk after having been called on by the Market Administrator to correct the practice. A co-operative which persists in utilizing milk in a lower use value after receiving notice of an unfulfilled market demand for milk in a higher value use is engaging in marketing activity that is inimical to the interest of the entire producer group in the market-wide pool provided for by this order, and any such co-operative should be precluded from receiving co-operative payments, from the producer-settlement fund, for thus failing to dispose of its milk in the highest use value for which there is an unfulfilled market demand.

In order to function properly in rendering the various market-wide services a co-operative should have a well established program administered by a staff of trained specialists. A budget of substantial size is necessary. The required market-wide

services can be rendered more effectively and at less expense to the producers, in general, by a few large co-operatives or federations of co-operatives than by numerous small organizations. A large organization is able to hire larger and better qualified staffs of experts than a small group and a large organization is able to undertake more extensive research projects than a small group is able to undertake. A large organization represents the views of its diversified membership and is able to provide the necessary facilities and competent personnel to deal effectively with the problems confronting the producer group. A small co-operative may, under some circumstances, render services of market-wide character, but the present-day needs and complexity of this great milkshed are such that, for practical purposes, co-operative payments from the producer-settlement fund should be limited to co-operatives or federations of co-operatives that meet the minimum size requirements established in the amendments to the order as later set forth in this decision.

Any co-operative or federation of co-operatives that has at least 4,000 producer members and in the various other respects also meets the criteria set forth in the amendments to the order, as later set forth in this decision, should receive from the producer-settlement fund a payment of 2c per hundredweight of milk marketed during each month by the producer members of such group. Although a smaller co-operative or federation may, under some circumstances, render services of market-wide character, nonetheless the complex attributes of this milk market are such that, as a practical matter, a co-operative

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or federation should, for this purpose, have at least 4,000 producer members so as to be able to maintain a staff and facilities requisite to the performance of the necessary market-wide services. Co-operatives that cannot individually qualify under the requirement for at least 4,000 producer members may federate, and by means of the federation perform market-wide services so as to qualify for payments to the federation under the amendments to the order as set forth in this decision.

As a co-operative or federation increases in size its services to the market as a whole are of more widespread character and value, and therefore such organization should receive a higher rate of payment than a smaller organization. Co-operatives and federations of more than 6,000 members have their membership distributed among several states in the milkshed, whereas the membership of smaller co-operatives or smaller federations tends to be localized in smaller and more compact geographical areas. The larger organizations are, therefore, inherently better equipped to perform market-wide services, and all producers will benefit more if the larger organizations undertake the more extensive, and costly, market-wide services. Also the cost per member for furnishing market-wide services tends to increase as the co-operative increases in size because of the distribution of membership over widely separated areas. Any co-operative or federation of co-operatives that has at least 6,000 producer members and in the various other respects also meets the criteria set forth in the proposed amendment should receive from the producer-settlement fund an additional payment of 1

cent per hundredweight of milk marketed during each month by such group.

Co-operatives that operate marketing facilities, *i. e.*, pool plants, render services to the market as a whole that are of greater value than the services rendered by non-operating co-operatives. An operating co-operative has more continuous and closer contacts with its members, and also its members have a more extensive and vital interest in the marketing problems in the milkshed than is true of non-operating co-operatives. By virtue of its own marketing functions, a co-operative that operates marketing facilities has first-hand knowledge of the constantly changing conditions affecting the receipt and distribution of milk and milk products. Such co-operative thus has more direct and intimate knowledge of market conditions and developments than a non-operating association and becomes immediately aware of changes in supply and demand, price relationships, and the various other factors of marketing. Operating co-operatives therefore are in a more advantageous position than non-operating co-operatives for discerning the need to change class prices. This is important because the prompt readjustment of class prices to reflect changed economic conditions is necessary to maximize returns to all producers and yet provide an outlet for all of their milk.

Any co-operative that meets the eligibility standards, in the amendments in this decision, and also operates marketing facilities at which is received at least 25 per centum by weight of the milk marketed by its producer members, should receive from the producer-settlement fund a payment of an additional 1c per hundredweight of milk

marketed during each month by the producer members of such co-operative. A federation whose members include operating co-operatives should receive the additional payment of 1c per hundredweight if at least 25 per centum, by weight, of the milk delivered by the producer members of the federated co-operatives is received at plants operated by a co-operative member or members of the federation or at plants, if any, operated by the federation. To comply with the 25 per centum requirement a co-operative or the members of a federation will have to handle not less than approximately 380,000 pounds of milk per day (4,000 [members] times 25 per centum of 380 [average production per day per dairy]). The marketing of this substantial volume of milk will require alertness to, and familiarity with, daily marketing conditions.

The market-wide services, required to be performed in the interest of all producers, will be effectively performed if the co-operatives are paid at the rates set forth in the amendments in this decision. The value to all producers of the performance of the market-wide services will at least equal the amount of the payments to the co-operatives. The co-operatives should, under the amendments, submit budgets which will be carefully studied, and the performance of the market-wide services should be under the constant scrutiny of the Market Administrator. Experience may, of course, reveal the need for revision of the rates. However, under the record of this hearing, the co-operatives should receive payments for the performance of market-wide services in accordance with the rates set forth in the amendments.

The aggregate amount of the payments to co-operatives, under the amendments contained in this decision, cannot be exactly determined inasmuch as it is not known at the present which co-operatives or federations will qualify for the payments, but an adequate basis exists for estimating with reasonable accuracy the maximum amount of the payments to all co-operatives and federations, and the cost per producer, in the milkshed, for the payments to co-operatives and federations under these amendments. The total value of the milk pooled and priced under the New York order in 1951 was $310,292,982. The total amount distributed in 1951 as co-operative payments was $1,273,109, *i. e.*, 4/10 of 1 percent of the total value of the milk pooled. Translated into terms which would project the total expenditures from the producer-settlement fund to producers as individuals irrespective of whether they are members of a co-operative or are non-members, the average individual expenditure to the producers marketing milk under the order in 1951 was slightly over $25.00. If, for example, it is assumed that all of the co-operatives in the milkshed should qualify, separately or as members of a federation, for the payment of 2 cents per hundredweight provided for in the amendments to the order as hereinafter set forth, such payments would amount to $975,000 per year based on the data for 1952. The payments to co-operatives and federations may, in the aggregate, be increased under the amendments by virtue of the additional payment of 1 cent per hundredweight to operating co-operatives and federations and 1 cent per hundredweight additional to any co-operative or federation which has a member-

ship of 6,000 or more. But the aggregate or total of co-operative payments under these amendments, as set forth in this decision, will not be in excess of 1/2 of 1 percent of the total value of the milk pool. The aggregate of these payments from the producer-settlement fund to the co-operatives and federations will represent approximately $25 for each producer in the milkshed, and approximately 70 percent of the producers are members of co-operative associations of producers. The value of the market-wide services, under this complex and intricate regulatory program, is worth more to each producer than the small amount paid to the co-operatives for the performance of the market-wide services. A change, for example, of 1 percent in the uniform price would affect the average annual return of a producer—which in 1951 was approximately $6,300—by more than $60.

The co-operatives incur expenses in the performance of these market-wide services at least equal to the amount thus received from the producer-settlement fund. It is only by means of making these payments from the producer-settlement fund to the co-operatives for the performance of market-wide services that a uniform blended price may be arrived at which will equitably apportion the total value of the milk, purchased by all handlers, among producers and associations of producers on the basis of their marketings of milk during each month which, under the order, is the proper representative period for this purpose. Also, the payments to the co-operatives for the performance of the market-wide services are incidental to, and necessary to effectuate, the classification

pricing, and pooling of milk, and inasmuch as the payments are for the performance of market-wide services the payments are not for milk, but are for services, and thus the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk. The market-wide services and the payments therefor are not inconsistent with the statutory requirement for uniform prices for milk subject only to the variations or adjustments referred to in the statute.

The members of a co-operative or federation should continue, in accordance with the principle heretofore observed under this order, to pay the entire cost of the activities of such co-operative or federation which are not of market-wide benefit. A co-operative receiving payments, or a federated co-operative, under the amendments set forth in this decision should be required to receive from its producer members at least 1¢ per hundredweight of milk marketed by its producer members. That requirement tends to safeguard against a co-operative's depending upon the co-operative payments to finance activities that are not market-wide. If a federation performs activities which are solely market-wide in nature for the benefit of all producers, the federated co-operatives comprising the federation should not be required to make any payments to the federation, except that the Market Administrator's rules and regulations should, among other things, require, whenever necessary to insure the performance of the market-wide services for which the co-operative payments are made, a minimum monthly payment by federated co-opera-

tives to the federation so as to be sure that a federation which receives co-operative payments will fully perform the market-wide services for which the payments are made, and not depend upon co-operative payments to finance activities, if any, that are not market-wide in character.

In order to assure adequate performance of the market-wide services by an applicant for co-operative payments, certain standards are enumerated in the amendments. In order for a co-operative to qualify for payments it should appear that such co-operative is duly incorporated under the co-operative corporation laws of a state; that it is qualified under the Capper-Volstead Act (7 U. S. C. 291 *et seq.*); and that all of its activities are under the control of its members and that it has full authority in the sale of the milk produced by its members. Any such co-operative must have at least 4,000 members who are producers and from whom the cooperative receives not less than 1¢ per hundredweight of milk delivered by the members. In order for a federation to qualify for payments it should appear that such federation is duly incorporated under the laws of a state, and that each of its members is a duly organized co-operative. The federated co-operatives should have an aggregate of not less than 4,000 members who are producers from whom the federated co-operatives receive not less than 1¢ per hundredweight of milk delivered by their producer members. Also, when required by rules and regulations of the Market Administrator the federated co-operatives should pay to the federation the minimum monthly payment specified in the rules and regulations to finance any activities of the

federation that are not market-wide in character.

A cooperative receiving payments should be permitted to affiliate with a federation of other cooperatives, but the membership of the cooperative receiving payments should not be counted for the purpose of determining the size or the amount of payment to be made to the federation. The cooperative payments should be made to the individually qualified cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments. In addition, a federation should have contracts with each of its federated cooperatives under which the cooperatives agree to remain in the federation for at least one year, and such contracts should cover or be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes. These provisions ensure a degree of stability to the federation, and permit it to offer employment incident to the performance of market-wide services for a period of at least one year. These provisions, while preventing double payments, permit cooperatives receiving payment, to give their support and assistance to federations of other cooperatives.

No producer should be counted more than once in determining the membership of the various cooperatives or federations qualified to receive cooperative payments,

and two organizations should not receive payment on the same milk delivered by a producer.

In determining whether a federation of cooperatives is eligible to receive an additional payment of 1c per hundredweight, by reason of receiving at least 25 per centum, by weight, of the milk delivered by members of the federated cooperatives at plants operated by the cooperatives or the federation, the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation claiming or receiving cooperative payments on the same milk, or which is not meeting all of the requirements applicable to it should not be considered. The payment to be made to a federation should be determined only by the milk delivered by producer members of cooperatives which individually meet all of the requirements applicable to them.

A cooperative or a federation may apply to the Market Administrator for payments, and the Market Administrator should make a determination as to whether or not the applicant meets the requirements in the amendments set forth in this decision. For initial qualification the applicant should demonstrate its ability to perform the various market-wide services described in the amendments to the order as set forth in this decision, and any such application should be accompanied by a written plan which details its proposed program for the performance of market-wide services, and the Market Administrator should be satisfied, before approving the application, that the applicant has the requisite personnel,

facilities, and plan for performing the market-wide services, and that such services will be performed.

The performance of market-wide services by the cooperatives or federations that receive payments should be under the constant scrutiny of the Market Administrator in accordance with the provisions in the amendments, in this decision, and in accordance with the rules and regulations to be issued by the Market Administrator. The cooperatives and federations receiving these payments should submit such reports and keep such records as may be deemed necessary by the Market Administrator to enable him to verify whether they are performing the market-wide services, and all such records should be available for inspection and audit by the Market Administrator. The cooperatives or federations that receive payments must perform the market-wide services enumerated in the amendments in this decision, and upon determination by the Market Administrator, after due notice and hearing, that a cooperative or a federation is failing to perform such services the payment should be discontinued by the Market Administrator and the action thus taken should be publicly announced. The proper grounds for disqualification are those enumerated in the amendments, and any cooperative or federation thus disqualified by the Market Administrator may within thirty days after the action thus taken appeal to the Secretary. If no such appeal is taken within that period of time, the action of the Market Administrator should be final. If an appeal is properly perfected, the final administrative decision should be made by the Secretary, but the record on appeal

should be limited to the record before the Market Administrator at the time of his determination. Efficient administration requires that there be a full and complete presentation of all relevant and material facts to the Market Administrator and that such evidence should not be withheld.

The amendments in this decision contain provisions to facilitate and expedite the administration of the provisions which authorize cooperative payments. The Market Administrator should be charged with the responsibility of determining initially whether a cooperative or federation of cooperatives qualifies to receive cooperative payments and also whether it continues to meet the prescribed eligibility and performance requirements. The determination by the Market Administrator should be subject to review by the Secretary upon application therefor by the cooperative or federation. There should be centralized in the Market Administrator the initial responsibility for qualification and disqualification, and no action to disqualify a cooperative or federation should be taken by the Market Administrator until after the cooperative or federation has been notified by the Market Administrator of the alleged failure to meet one or more of the requirements and has been given an opportunity to be heard.

Provision is made in the amendments for the issuance by the Market Administrator of rules and regulations to effectuate the provisions of the order relative to cooperative payments. Broad authority is thus provided for the issuance of rules and regulations. Such regulations should be designed to implement the order provisions and specify in more detail the administra-

tive requirements in connection with the duty imposed on the Market Administrator to make determinations concerning the qualification and disqualification of cooperatives to receive the payments authorized. Rules and regulations for that purpose should be issued only in accordance with the prescribed procedure (similar to that provided in Sec. 927.36 of the order) under which interested parties are provided full opportunity to participate in their formulation. This provision gives a degree of flexibility to the administration of the order provisions and permits the cooperatives and federations to be fully informed as to the administrative practice.

The amendments to the order should provide that, for a period of 90 days after the effective date of the amendments, a cooperative shall receive the same rate of payment for performing the market-wide services as provided in the present order, unless prior to the expiration of the 90 days the cooperative has been qualified under the new amendments. If by the end of the 90-day period, the cooperative has filed an application for qualification under the proposed amendments and if the cooperative continues to perform the market-wide services under the order now in effect, the cooperative should continue to receive the payments set forth in the order now in effect until the application is acted upon by the Market Administrator. The cooperatives are presently performing market-wide services of benefit to all producers, and if the cooperatives continue to perform these services they should continue to receive payments during this transitional period for such services. Under the amendments in this decision, in

order to qualify for payments the cooperatives may have to reorganize and supplement their staffs in addition to other changes which may be required. It may take some cooperatives or federations a reasonable period in order to meet the requirements contained in the amendments and the rules and regulations which are to be issued. It would be contrary to the interests of all producers in the market to be deprived of the market-wide services now performed by cooperatives during this period. In addition, the Market Administrator will have to issue rules and regulations to implement the provisions of the order, and this action by the Market Administrator must, under the amendments, be issued after participation by the industry in public meetings. The Market Administrator will have to give adequate notice of the meetings to the industry so that the industry will have adequate time within which to prepare their evidence and arguments. For example, rules and regulations will be needed to implement the initial qualification provisions, and other provisions, such as those precluding double payment in the event a producer or a cooperative is a member of one or more organizations receiving payments. In order that the Market Administrator may have adequate time within which to issue the rules and regulations, and in order to permit the cooperatives and federations to become familiar with the new amendments and the rules and regulations and to take any other action which may be necessary in order to permit the cooperatives and federations to qualify for payments under the new amendments, the order should contain the

90-day provision set forth in the amendments.

It was suggested at the hearing that in order to foster and encourage the growth of cooperatives and federations for the better performance of market-wide services, the continued eligibility for payment be contingent upon attainment of prescribed increases in membership within specified periods. By providing for an additional payment to cooperatives or federations of 6,000 members or more the desired result will be accomplished by the amendments proposed in this decision. If it should develop that these amendments are inadequate or ineffective, a hearing may be called for the purpose of considering appropriate amendments prior to the expiration of the two-year period suggested at the hearing as the time within which the first increase should be attained.

Other proposals which should not be adopted at this time are those with respect to an additional "matching" payment from the producer-settlement fund and the establishment of an advisory committee to collaborate with and advise the Market Administrator relative to the administration of the cooperative payment provision of the order.

The deduction of additional sums from members to pay for other services is not so directly related to the performance of market-wide services as to justify an automatic increase in the payments from the pool. The rates provided in the proposed amendments should assure the adequate performance of the market-wide services contemplated in this decision. If these rates should prove inadequate, they may

be changed through the amendment process.

The establishment of a formal advisory committee is not necessary, under the amendments, to the effective administration of the cooperative payment provision of the order. The procedure provided in connection with the issuance of rules and regulations should provide adequate opportunity for the participation of producer groups in the development of administrative requirements incident to the cooperative payment provision. Moreover, such groups may at any time submit recommendations and suggestions to the Market Administrator for the more effective administration of this provision.

It was proposed at the hearing that funds for administration of the co-operative payment provision—as distinguished from the co-operative payments—be taken from the producer settlement fund rather than from the administrative assessment fund. Provisions of the act authorizing the issuance of milk marketing orders require that the cost of administering the order be paid from funds derived from a pro rata assessment on the milk received by handlers subject to the order, and the cost of administering the cooperative payment provision of the order is merely a part of the cost of administration required to be financed from the administrative assessment fund.

In addition to the foregoing, it is further found and concluded that:

(a) The marketing agreement and the order, as amended and as hereby further amended, and all of the terms and condi-

tions thereof, will tend to effectuate the declared policy of the act.

(b) The terms and conditions in the amendments are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of Sec. 8c of the act (7 U. S. C. secs. 608c (5)–(7)) and necessary to effectuate the other provisions of the order.

(c) The terms and conditions in the amendments are necessary in order equitably to apportion the total value of the milk purchased by all handlers among producers and associations of producers, on the basis of their marketings of milk during each month which is the proper representative period.

(d) The terms and conditions in the amendments are necessary to accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in the relevant acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(e) The parity prices of milk as determined pursuant to section 2 of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply of and demand for milk in the marketing area, and the minimum prices specified in the marketing agreement and in the order, as amended, and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

(f) The marketing agreement and the order, as amended, and as hereby further amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity, specified in a marketing agreement upon which a hearing has been held.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 697

OSCAR L. GRANT, et al.,
Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and
DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, and
ADAMS PRODUCERS COOPERATIVE, INC., et al., and
METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC.,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DANIEL J. CAREY, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

	PAGE
NIONS BELOW	1
RISDICTION	2
ESTIONS PRESENTED	2
ATUTES AND REGULATIONS	2
ATEMENT	2
GUMENT	2
. BY REASON OF THE JOINT FEDERAL-STATE NATURE OF THE REGULATORY PROGRAM UNDER ATTACK HERE, THIS CASE IS DISTINGUISHABLE FROM *BRANNAN* v. *STARK*	3
. THE DECISION OF THE COURT BELOW IS CORRECT	11
NCLUSION	13
PENDIX A	14
PENDIX B	17
PENDIX C	22

Table of Citations

SES:

Brannan v. Stark, 342 U. S. 451	2, 3, 11
Federal Communications Com'n. v. RCA Communications, Inc., 346 U. S. 86, 90-92	12
First National Bank v. Beach, 301 U. S. 435, 440-441	12
Hood & Sons v. DuMond, 336 U. S. 525, 560	7
Nebbia v. New York, 291 U. S. 502	4, 5
People v. Teuscher, 248 N. Y. 454	4, 5
Prudential Insurance Co. v. Benjamin, 328 U. S. 408	10
Secretary of Agriculture v. Central Roig Co., 338 U. S. 604, 614	12
Welch v. Helvering, 290 U. S. 111, 113-114	12
Whitfield v. Ohio, 297 U. S. 431	10

PAGE

STATUTES:
FEDERAL—
Agricultural Marketing Agreement Act of 1937
Sec. 608c(5) 10
Sec. 608c(5)(A) 12
Sec. 608c(5)(B) 12
Sec. 608c(5)(D) 9
Sec. 608c(7)(D) 12
Sec. 610(i) 7, 10
NEW YORK—
Agriculture and Markets Law of the State of New York
Article 21, Sec. 254(a) 3
Article 21, Sec. 258-k 3, 4
Article 21, Sec. 258-n 6

REGULATIONS:
FEDERAL REGISTER—
3 F.R. 1951 8

MISCELLANEOUS:
Memorandum of Agreement dated August 26, 1938 7, 8
New York Milk Order 126 22-38
Sen. Rep. No. 565, 75th Cong., 1st Session 12

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OPINIONS BELOW

The opinion of the District Court (R 175-183) is not reported. The opinion of the Circuit Court of Appeals has not yet been reported but has been printed in the Appendix to the Petition (pp. 26-39).

JURISDICTION

The jurisdictional facts are recited in the Petition.

QUESTIONS PRESENTED

1. The question directly involved relates to the authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. The statement of this question in the brief of the Secretary is adopted.

2. A second question potentially in the case is whether this is a class action. Since this will be reached for decision only in the event of reversal of the judgment below, it is not discussed in this brief.

STATUTES AND REGULATIONS

The statutes and regulations pertinent to the points here discussed are set forth in the Appendix *infra* or in full at the place of reference in the text.

STATEMENT

The statement of the case in the brief of the Secretary of Agriculture is adopted.

ARGUMENT

I.

In the interest of avoiding unnecessary repetition, this brief will discuss only one of the several grounds for denial of the Petition, namely, that by reason of the joint Federal-State nature of the regulatory program, the case is distinguishable from *Brannan* v. *Stark*, 342 U. S. 451,

and the decision of the court below is right. On other points, the arguments in opposition to certiorari of the Secretary of Agriculture and of the respondent cooperatives are regarded as fully adequate.

A.

By Reason of the Joint Federal-State Nature of the Regulatory Program Under Attack Here, This Case Is Distinguishable from Brannan v. Stark.

Petitioners have placed almost total reliance upon claimed conflict between the decision of the court below and the decision of this court in *Brannan* v. *Stark*. Largely, their case must stand or fall upon that ground. Of the several important points of difference between the two cases, the joint Federal-State nature of the program involved here but not in the *Stark* case, is the most important from the point of view of the State of New York. Regulation of the milk supply for the New York metropolitan area, including price fixing and equal sharing of marketing costs, is of vast public concern in the State as is plainly shown by Sections 254(a) and 258k, Article 21, of the Agriculture and Markets Law of the State of New York (McKinney's Consolidated Laws of New York, annotated, 1954), which provide in part:

> "The department through the commissioner is hereby vested with the powers * * *, including the following:
>
> "(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York" (Section 254(a) of the State Statute)
>
> "It is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the con-

suming public which ought to be safeguarded and protected in the public interest; that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with federal government, in its regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state; that for such purpose public interest requires, as necessity therefor has arisen or may arise, the fixing of prices of milk to be paid to producers and associations of producers where there has been or is a disruption of orderly marketing of milk in any marketing area by reason of surpluses or by reason of unfair, unjust or destructive trade practices so that the prices of milk to the producers are or may be below the reasonable costs of production and impair their purchasing power; that in order to make such price-fixing effective it is necessary that the benefits of the fluid market and the burden of, and the expense of, handling of surpluses, be shared equally by all producers of milk for the marketing area and to this end that dealers not handling their proportionate share of the surpluses shall as part of the price of their milk make payments to a fund to equalize the prices of milk to producers and to share the cost of handling surplus so as to remove one of the principal causes of price demoralization." (Section 258k)

The background and purpose of the State regulatory legislation has been outlined and discussed extensively in *Nebbia* v. *New York*, 291 U. S. 502 and *People* v. *Teuscher*, 248 N. Y. 454. In the *Nebbia* case, it was pointed out that "Save the conduct of railroads, no business has

been so thoroughly regimented and regulated by the State of New York as the milk industry". (p. 521) "Under our form of government, the use of property and the making of contracts are normally matters of private and not of public concern. * * * But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at his will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." (p. 523)

In the *Teuscher* case, it was noted that "More and more, in its social engineering, the law is looking to cooperative effort by those within an industry as a force for social good. It is harnessing the power that is latent within groups, as it is harnessing the power of wind and fall and stream. Conspicuously is it doing this in its dealings with agricultural producers, spread often over wide areas and thus deficient in cohesion, but yielding up new energies when functioning together. * * * We see it in the cooperative marketing associations * * * of recent years * * *, associations with privileges and powers peculiar to themselves." (p. 487)

Cooperative payments which are here challenged have been regarded by the State as sufficiently vital to the New York metropolitan area that they have been expressly provided for in the State statute (Appendix *infra* pp. 14-15). A plan of regulation meeting the requirements of the State policy as prescribed by its statutes has been achieved in the joint Federal-State program. Without continuing Federal cooperation, the present scheme will collapse. Whether the public interest in the state can be served by any alternative scheme not involving federal cooperation is at least doubtful.

Cooperative Federal-State regulation is expressly authorized by both the Federal and the State statutes. The Federal act provides:

"The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 24 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture." (7 U.S.C. 610(i))

The State statute provides:

"The Commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders." (Section 258n of the Agriculture and Markets Law of the State of New York; Appendix *infra* pp. 15-16)

Pursuant to these statutory authorizations, the Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York entered into a

Memorandum of Agreement on August 26, 1938 (Appendix *infra* pp. 16-21). This Agreement has continued in effect to the present time. It is a statement of principles of procedure for administering a joint regulatory program for the marketing of milk in the New York metropolitan area. It provides in part:

> "It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders * * * and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders." (Appendix *infra* p. 17)

The nature of the integrated regulatory scheme contemplated by Congress in enacting Section 610(i) *supra* has been described by Mr. Justice Black in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 560, as follows:

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

Following the procedures authorized by their respective statutes and set forth in the Memorandum of Agreement of August 26, 1938, the Secretary and the Commissioner held joint hearings before the initial promulgation in 1938 of orders embodying the now contested provisions for cooperative payments. Orders issued by the Secretary and the Commissioner were based respectively on the record of the joint hearings and were concurrent with and complementary to each other, being identical in all material respects. The effectiveness of each of these orders was conditioned upon the effectiveness of the other. In adopting the order, the Secretary of Agriculture provided:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary * * *" (3 F.R. 1951)

The order of the Commissioner contains the following provision:

> "NOW, THEREFORE, in cooperation with the United States and its Secretary of Agriculture, and pursuant to the power and authority conferred upon me by Section 258n and other applicable provisions of the Agriculture and Markets Law, and for the purpose of keeping uniform the said joint and concurrent orders;
>
> "IT IS HEREBY ORDERED", etc. (Appendix *infra* p. 24)

In the case of each amendment to the complementary orders after 1938, similar joint hearings were held and upon the records of such joint hearings concurrent and complementary and, in substance, identical orders were issued. From its inception the program of milk regulation in the New York metropolitan area has been administered by a Market Administrator appointed jointly by

the Secretary and the Commissioner, and, by delegation of authority to him, the Administrator has at all times been clothed simultaneously with all of the authority, both Federal and State, conferred by the respective statutes. He does not exercise separately Federal authority part of the time and State authority part of the time; rather, all of his official acts are supported by both. Thus, the regulatory scheme has been tailored exactly to fit the actual traffic in milk which it was designed to regulate. There is a single pool which is neither Federal nor State but joint; and likewise there is a single regulatory program which is neither Federal nor State but joint.

The statute of the State of New York contains an express provision for payments to cooperative associations for marketwide services (Appendix *infra* pp. 14-15). The Commissioner of Agriculture and Markets has held that the payments so authorized by the law of his State should be made as a necessary part of the scheme of regulation and provision for cooperative payments is part of the order which he issued (Appendix *infra* pp. 21-22, 25). To insure that these cooperative payments are in fact made only for market-wide services, he has further required the cooperatives to collect from their members one cent per hundredweight of their milk to pay for other cooperative activities. In this respect, see also the brief of respondent cooperatives at page 6. In support of an order concurrent with and complementary to that of the Commissioner, the Secretary has found that cooperative payments are necessary and that they come within the Federal statutory authorization for order provisions "incidental to, and not inconsistent with, the terms and conditions specified in (5)-(7) and necessary to effectuate the other provisions of such order". (7 U.S.C. 608c (5)D) The Secretary has found, under all of the circumstances shown by the voluminous hearing record in

this case*, including the significant facts that this is a joint Federal-State program and that the State statute expressly authorizes cooperative payments, that cooperative payments are authorized in his order which was issued concurrent with and complementary to the State order.

The Secretary's authority is not limited to his separate and individual regulation of milk under the provisions of Section 608c(5) of the Federal statute. In addition, he is directed, upon request of State authorities, to confer with and hold joint hearings with duly constituted authorities of any State. He is authorized to cooperate with a State in the use of records, personnel and facilities and to issue concurrent and complementary orders (*supra* p. 6). The scope of State authority may be enlarged in circumstances such as those in the present case by reason of Federal consent to State regulation in certain areas subject to Federal regulation (*Whitfield* v. *Ohio*, 297 U. S. 431; *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408). Section 610(i) of the Federal act, referred to above, recognizes a State as well as a Federal area of regulation. In any view of the case, State authority constitutes an integral part of the regulatory scheme so that the subject matter to be dealt with here is in fact a joint program.

Petitioners would eliminate this fact as immaterial. They have not challenged the authority of the Commissioner of Agriculture and Markets to require cooperative payments. Neither have they made any attempt to show that the milk which they produce and sell is beyond the regulatory power of the Commissioner. They seek only to stay the arm of the Secretary as was done in the *Stark* case. However, the power of the arm of the Secretary

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* The record is described in detail in the Statement in the brief of the Secretary of Agriculture.

alone, as in the *Stark* case, is vastly different, we submit, from the concurrent and complementary power of the arms of both the Secretary and the Commissioner of Agriculture and Markets. Assuming, as petitioners contend, although contrary to cogent arguments in the briefs of the other respondents, that the holding in *Brannan* v. *Stark* would under any circumstance prevent cooperative payments by the Secretary acting alone, there would nevertheless be no conflict between the decision there involving such separate action and the decision of the Circuit Court in this case involving joint action.

B.

The Decision of the Court Below Is Correct.

This case not being in conflict with *Brannan* v. *Stark*, there remains little doubt of its correctness. On all other grounds, the decision below was an unanimous affirmance of the views of the Trial Judge. A dissent by one of the judges of the Circuit Court rested solely on the view that the present case is not distinguishable from *Brannan* v. *Stark*. Otherwise, the dissenting judge agreed "entirely with the excellent analysis and disposition of the problem" in the majority opinion. In addition to arguments in the briefs of other respondents, it is here pointed out that in the present case the Secretary is exercising his power to cooperate with State authority. Whatever necessity for cooperative payments may exist in the absence of Federal-State cooperation, necessity is even clearer in a case where such cooperation exists between the Federal Government and a State which is authorized to and does require cooperative payments.

The statutory terms in the State and Federal statutes are of general scope for application in a wide variety of circumstances. The petitioners refer, in their brief, only to the Federal Act, the relevant terms of which are that

a milk order may provide "a method" of regulation, may provide a uniform price for milk subject to provisions "equitably to apportion" the value of the milk among all producers, and may include provisions that are "incidental", "necessary", and "not inconsistent" with the other statutory provisions. (7 U.S.C. 608c(5)(A), 608c (5)(B), and 608c(7)(D)) These provisions in the Act are variables to be applied to diversified circumstances, and the scope of the statutory terms cannot be determined merely as a matter of law. Here as in *First National Bank* v. *Beach*, 301 U. S. 435, 440-441, the statutory terms "have a color and a content that may vary with the setting" and in each case the totality of the facts is to be considered and appraised. It is familiar doctrine that the "penumbral bounds" of general terms in a regulatory statute are not to be interpreted in "an abstract, sterile way". *Federal Communications Com'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 90-96. See, also, *Secretary of Agriculture* v. *Central Roig Co.*, 338 U. S. 604, 614.

Congress recognized that the terms in the Federal statute are applicable to divergent and mutable situations, and that the effectiveness of the statutory provisions "depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions". Sen. Rep. No. 565, 75th Cong., 1st Sess., p. 3; H. R. Rep. No. 468, 75th Cong., 1st Sess., p. 3. Here, as in *Welch* v. *Helvering*, 290 U. S. 111, 113-114, "the decisive distinctions (in applying statutory terms of general import to factual situations) are those of degree and not of kind." It has been said that an attempt to harmonize various decisions with respect to statutory terms which in application have their rootage in factual situations is "a futile task" because it involves "the appreciation of particular situations, at times with borderline conclusions." *Id.* at 116.

CONCLUSION

For the foregoing reasons, together with the reasons discussed in the briefs for the other respondents, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Provisions of the statute of the State of New York relevant to the arguments contained in this brief but not fully set forth at the place of reference in the text are set forth below. The official citation of them is Article 21 of the Agriculture and Markets Law of the State of New York, Sections 258-m 1, 10, 11 and 258-n. (McKinney's Consolidated Laws of New York annotated, 1954)

Sections 258-m 1, 10, 11 provide:

"1. Upon the petition of a producers' bargaining agency of the production area supplying a marketing area, such agency representing at least thirty-five per centum of the producers of milk therein, alleging the existence of conditions so affecting the orderly marketing of milk in such area that public interest requires regulation of prices of milk in such area and equalization of the burden of surplus milk and expense of handling it, and sharing the benefits of the fluid market in order that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective, it shall be the duty of the commissioner to call a public hearing for the consideration of said petition and to give notice thereof by advertising such call with a copy of such petition in such newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time not less than ten days after the date thereof and a place within the marketing area at which the hearing will be held and at which the applicants and other persons, including producers, distributors and consumers and associations thereof, may be heard. If after such hearing the commissioner shall find, upon the testimony given at the hearing that conditions referred to in section two hundred and fifty-eight-k exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective and that it is necessary that prices

for milk to producers and associations of producers be fixed by the commissioner, as expressed by section two hundred and fifty-eight-k, and that it is favored by at least sixty-six and two-thirds per centum of the producers of milk produced in the production area for said marketing areas, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. Such price fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions have ceased to exist or that such termination is favored by at least thirty-five per centum of the producers of milk handled within such market."

"10. Any marketing agreement or order of the commissioner may provide for necessary deductions from payments to producers to cover the cost of administering such marketing agreement or order, including the cost of auditing milk dealers' classifications, and the cost of other services to producers. The funds so derived from such deductions shall not be deemed state funds. The commissioner may, in his discretion, appoint an administrator and such assistant administrators as in his opinion may be necessary to administer the terms of any agreement or order, and the persons so appointed shall be deemed to occupy positions confidential to the commissioner and may be appointed without competitive examination. All other persons employed by the commissioner in the administration of such a marketing agreement or order shall be selected in accordance with the civil service law and rules."

"11. Any marketing agreement or order of the commissioner may provide (a) for payments to cooperative associations of producers in cases where the commissioner finds that such associations are actually rendering such marketing services to producers under contract with them, or are rendering services in the control and disposition of surplus for the benefits of the market; (b) for payment to milk dealers or to cooperative associations of producers which operate milk receiving stations or manufacturing plants for services rendered by them, in the stabilizing of the

supply of fluid milk and cream within the market at times either of surplus or of shortage of milk; and (c), if the commissioner shall find that it is in the public interest and will tend to effect a more favorable seasonal balance as between production and consumption; for the making of deductions from the fund to equalize the prices of milk to producers, in computing the equalized base price for any of the months January through June of any year, in amounts in accordance with such order or marketing agreement provided the commissioner shall have found such amounts reasonable to provide an incentive for production in accordance with fluid market needs and/or as a means of reducing or eliminating seasonal adjustment of class prices, which amounts so deducted for any of such months in any year shall be held as a special reserve solely for adddition to the equalization fund for any of the months of July through December next following such deductions, and in such manner and for such months as the order or marketing agreement may provide. Such deductions and amounts constituting a special reserve shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds. The commissioner shall make no order for such deductions constituting a special reserve under this section except on the petition of a producers' bargaining agency of a production area supplying a marketing area where a state order is in effect exclusively or in effect concurrently with a federal order which authorizes such deductions pursuant to the provisions of the agricultural marketing agreement act of nineteen hundred thirty-seven and after a public hearing and subsequent producer approval is required by section two hundred fifty-eight-m of the agriculture and markets law."

Section 258-n provides:

"The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform

milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders."

APPENDIX B

(Record Reference, Joint Appendix 85-90)

MEMORANDUM OF THE PRINCIPLES OF COOPERATION TO BE OBSERVED IN THE FORMULATION AND ADMINISTRATION OF COMPLEMENTARY ORDERS FOR MILK FOR MARKETING AREAS LOCATED WITHIN THE STATE OF NEW YORK TO BE ISSUED CONCURRENTLY BY THE SECRETARY OF AGRICULTURE AND THE COMMISSIONER OF AGRICULTURE AND MARKETS.

In order that the policies of cooperation embodied in Section 10(i) of Public Act No. 10, 73d Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agricultural and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules, or regulations may hereafter be issued.

Joint Procedure

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

Uniform Provisions

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers

supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

Exchange of Information

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective complementary and concurrent orders and relative to transactions within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10(i) of Public No. 10, 73d Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

Administrative Agency

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by

him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

Finances

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to the audit of both Federal and State authorities. Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

Administration

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

Interstate Cooperation

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regu-

lation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.

Signed this 26th day of August 1938.

/s/ Halton V. Moyes

Commissioner of Agriculture and Markets, State of New York

/s/ H. A. Wallace
Secretary of Agriculture

APPENDIX C

When this suit was instituted on March 11, 1952, the provisions for cooperative payments were contained in Section 927.76 of Official Milk Order No. 126 as amended February 19, 1952. During the pendency of this case, Order No. 126 was further amended effective December 16, 1953.

Section 927.76 as amended February 19, 1952, provided: (Record reference, joint appendix 475-476)

> "Sec. 927.76 Cooperative payments. Any cooperative association of producers may apply to the Commissioner for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members; arranging for and supplying, in a manner commensurate with the marketing capacity of the several types of cooperative associations designated in this section, in times of short supply, Class 1 milk to the marketing area; securing

utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers; having its entire activities under the control of its members; and complying with all provisions of this order applicable to it.

"After the Commissioner has determined any cooperative to be qualified to receive payments pursuant to this section, such cooperative shall, from time to time, as requested by the market administrator, make reports to the market administrator with respect to services rendered to the market and the use of the sums received under this section. Whenever the market administrator has reason to believe that any cooperative qualified by the Commissioner is failing to perform the obligations covered by the payments under this section, he shall suspend and hold in reserve such payments, notifying the Commissioner and the cooperative of his action and the reasons therefor. Such suspended payments shall be held in reserve until the Commissioner has, after hearing, ruled upon the performance of the cooperative in whole or in part or disqualified the cooperative, in which event the balance of payments held in reserve shall be returned to the producer settlement fund.

"The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the report upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

"(a) Three-quarters of one cent per hundredweight of milk received from producers at any handler's plant which was caused to be delivered from its members by such associations and on which such handler has made the reports and payments required by this order;

"(b) Except as set forth in paragraph (c) of this section, two cents per hundredweight of milk received from producers at plants of other complying handlers which was reported and collected for by such associations; and

"(c) Four cents per hundredweight of milk received from producers at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Commissioner to have sufficient plant capacity to receive all the milk of producers who are members, four cents per hundredweight of milk received from producers which was caused by it to be delivered to any other complying handler and which is reported and collected for by such association."

The entire State Order No. 126 as amended December 16, 1953, is set forth below: (Record reference, joint appendix 65-73)

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF MILK CONTROL

ORDER AMENDING REVISED OFFICIAL ORDER NO. 126
EFFECTIVE DECEMBER 16, 1953

WHEREAS pursuant to the provisions of Article 21 of the Agriculture and Markets Law as amended, the Commissioner of Agriculture and Markets duly promulgated his Official Order No. 126 effective as of September 1, 1938, regulating the handling of milk produced for sale in the New York Metropolitan Milk Marketing Area as defined in such official order, which order as revised and amended is in full force and effect; and

WHEREAS the aforesaid Official Order No. 126 was promulgated jointly and concurrently with the promulgation by the Secretary of Agriculture of the United States of the latter's Order No. 27, regulating the handling of milk for the aforesaid marketing area and

WHEREAS the undersigned Commissioner, pursuant to the provisions of the Agriculture and Markets Law as amended, held with the Secretary of Agriculture of the

United States, a joint and concurrent public hearing at Syracuse, New York on January 22 and 23 and on February 16 to 21, 1953 at which all interested parties were afforded an opportunity to be heard on proposed amendments to the aforesaid revised Official Order No. 126 and to the joint and concurrent order (Order No. 27) issued by the Secretary of Agriculture of the United States; and

WHEREAS the Secretary of Agriculture of the United States has found and determined that upon the basis of the record of such hearing his Order No. 27 should be further amended and has on the 9th day of November 1953 issued an order making such amendment effective on and after December 16, 1953; and

WHEREAS it is hereby found upon the testimony given at the hearing hereinbefore mentioned that conditions referred to in Section 258-k of the Agriculture and Markets Law exist, so affecting the orderly marketing of milk in the New York Metropolitan Milk Marketing Area that the public interest requires that the public policy declared in Section 258-k of the Agriculture and Markets Law shall be made effective by further amending the said Official Order No. 126 as hereinafter set forth and that such amendment is approved or favored by at least two-thirds of the producers engaged in the production of milk for the aforesaid marketing area.

NOW, THEREFORE, in cooperation with the United States and its Secretary of Agriculture, and pursuant to the power and authority conferred upon me by Section 258-n and other applicable provisions of the Agriculture and Markets Law, and for the purpose of keeping uniform the said joint and concurrent orders;

IT IS HEREBY ORDERED that Official Order No. 126 be and it is hereby amended and pursuant to Section 19 of the Agriculture and Markets Law, such amendment shall be effective on and after December 16, 1953 as follows:

Delete Section 927.76 of the order as now in effect and substitute therefor the following:

"Sec. 927.76 *Cooperative payments for market-wide services.* Payments shall be made to qualified cooperatives or to federations under the conditions, in the manner, and at the rates set forth in this section.

(a) *Definitions.* As used in this section the following terms shall have the following meanings:

(1) 'Cooperative' means a cooperative association of producers which is duly incorporated under the cooperative corporation laws of a state; is qualified under the Capper-Volstead Act (7 U.S.C. 291 *et seq.*); has all its activities under the control of its members and has full authority in the sale of its members' milk.

(2) 'Federation' means a federation of cooperatives.

(3) 'Federated cooperative' means a cooperative which is a member of a federation and on whose membership the federation is an applicant for or receives payments under subparagraph (2) of paragraph (f) of this section.

(4) 'Member' means, when used with respect to a member of a cooperative or of a federated cooperative, only a member who is also a producer, as defined in Sec. 927.6.

(b) *Qualified cooperatives and federations.* A cooperative or federation may submit an application to the market administrator for payments under the provisions of this section. In accordance with the requirements of the rules and regulations issued by the market administrator, any such application shall include a written description of the applicant's program for the performance of market-wide services, including evidence that adequate facilities and personnel will be maintained by it so as to enable it to perform the market-wide services; and the applica-

tion shall contain a statement by the applicant that it will perform the required market-wide services for which it is applying for payments. The application shall set forth all necessary data so as to enable the market administrator to determine whether it meets the qualification requirements with respect to the payments for which the application is submitted. An application shall be approved by the market administrator only if he determines that:

(1) In the case of a cooperative:

(i) It has not less than 4,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them: *Provided,* That no person shall be counted in this respect as a member if he is a member of another cooperative which is an applicant for or which receives cooperative payments, or if he is a member of a federated cooperative.

(ii) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, it has not less than 6,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them, subject to the proviso in subdivision (i) of this subparagraph.

(iii) If the application is also for an additional payment under subparagraph (4) of paragraph (f) of this section, the cooperative is an operating cooperative which operates marketing facilities, i.e., pool plant(s), at which it receives at least 25 per centum, by weight, of the milk marketed by all of its members: *Provided,* That in determining whether the 25 per centum minimum requirement is complied with there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or

which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(2) In the case of a federation:

(i) It is duly incorporated under the laws of a state.

(ii) It has contracts with each of its federated cooperatives under which the cooperatives agree to remain in the federation for at least one year, and such contracts cover or will be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes.

(iii) Its federated cooperatives have an aggregate of not less than 4,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by them; and its federated cooperatives will pay to the federation, when required by rules and regulations issued by the market administrator, the minimum monthly payment specified in the rules and regulations to finance the activities of the federation that are not market-wide in character: *Provided,* That no person shall be counted in this respect as a member if he is a member of a cooperative which is an applicant for or which receives cooperative payments, or if he is a member of another federated cooperative.

(iv) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, the aggregate membership of the federated cooperatives is not less than 6,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by their members, subject to the proviso in subdivision (iii) of this subparagraph.

(v) If the application is also for an additional payment under subparagraph (5) of paragraph (f) of this section, the federation operates marketing facilities, *i.e.*, pool plant(s), or the federated cooperatives operate marketing facilities, at which is received at least 25 percentum, by weight, of the milk marketed by the members of the federated cooperatives: *Provided,* That in determining whether the 25 percentum minimum requirement is complied with, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or whiih is not meeting the requirements of this section applicable to it.

(3) The applicant cooperative or federation demonstrates that it has the ability to perform the market-wide services for which application is made, and that such services will be performed.

(4) The applicant cooperative or the federated operatives of an applicant federation are in no way precluded from arranging for the utilization of milk under their respective control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(c) *Notice of qualification or denial: Effective date.* Upon determination by the market administrator that a cooperative or a federation is qualified to receive payment for performance of the market-wide services, he shall transmit such determination to the applicant cooperative or federation and publicly announce the issuance of the determination. The determination shall be effective with respect to milk delivered on and after the first day of the month following issuance of the determination. If, after consideration of an application for payments for market-

wide services, the market administrator determines that the cooperative or federation is not qualified to receive such payments, he shall promptly notify the applicant and specifically set forth in such notice his reasons for denial of the application.

(d) *Requirements for continued qualification.* From time to time and in accordance with rules and regulations which may be issued by the market administrator, each qualified cooperative or federation must demonstrate to the market administrator that it continues to meet the qualification requirements for the payments and is fully performing the market-wide services for which it is being paid.

(e) *Market-wide services.* Each cooperative or federation shall perform the market-wide services enumerated in this paragraph. Such services are: (1) Analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Commissioner or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter; (5) conducting a comprehensive educational program among

producers—*i.e.*, members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend; and (6) in the case of a cooperative or federation which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of this section, operating marketing facilities, or having within its membership federated cooperatives operating marketing facilities, *i.e.*, pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives.

(f) *Rate, computation, time, and method of payment.*

(1) Subject to the provisions of paragraph (g) of this section, the market administrator, on or before the 25th day of each month, shall make payment out of the producer-settlement fund, or issue equivalent credit therefor, to each cooperative or federation which is qualified for such payments for market-wide services. The payment to a cooperative shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from its members, and the payment to a federation shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from the members of its federated cooperatives, subject in both instances to adjustment upon verification by the market administrator.

(2) Such payment or credit shall be at the rate of 2 cents per hundredweight of milk in accordance with sub-

paragraph (1) of this paragraph: *Provided,* That in computing payment to a cooperative there shall be excluded all of the milk of its members who belong to another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk; and *Provided further,* That in computing payment to a federation there shall be excluded all of the milk of members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) Any cooperative that has at least 6,000 members and any federation which has an aggregate membership of its federated cooperatives of at least 6,000 members shall receive a payment, in addition to the payment provided for in subparagraph (2) of this paragraph, of 1¢ per hundredweight of milk in accordance with subparagraph (1) of this paragraph and subject to the provisos contained in subparagraph (2) of this paragraph.

(4) Any cooperative that operates marketing facilities, *i.e.*, pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all of its members shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by its members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which received cooperative payments on the same milk or which is a federated co-

operative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(5) Any federation that operates marketing facilities, *i.e.*, pool plant(s) or whose members include one or more federated cooperatives that operate marketing facilities, at which is received at least 25 per centum, by weight, of the milk marketed by all the members of its federated cooperatives shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by such members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an appliant for or receives cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(6) If an individually qualified cooperative is affiliated with a federation, the cooperative payment shall be made to such cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments.

(g) *Disqualification.*

(1) The market administrator shall issue an order wholly or partly disqualifying a previously qualified cooperative or federation for payments authorized pursuant to this section and such payments shall not thereafter be made to it if he determines that:

(i) The cooperative or federation no longer complies with the requirements of this section: *Provided,* That in the case of the federation, if one of its federated cooperatives has failed to comply with the requirements of this section applicable to it or has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification, the federation shall be disqualified only to the extent that its qualification for payments or the amount of its payments are based upon the membership, milk or operations of such non-complying federated cooperatives;

(ii) The cooperative or federation has failed to make reports or furnish records pursuant to this section or pursuant to rules and regulations issued by the market administrator; or

(iii) In the case of the cooperative, it has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(2) An order of the market administrator wholly or partly disqualifying a cooperative or federation shall not be issued until after the cooperative or federation has had opportunity for hearing thereon following not less than 15 days' notice to it specifying the reasons for the proposed disqualification. If the cooperative or federation fails to file a written request for hearing with the market administrator within such period of 15 days, the market administrator may issue an order of disqualification without further notice; but if within such period a request for hearing is filed, the market administrator

shall promptly proceed to hold such hearing pursuant to rules and regulations issued by him under paragraph (i) of this section.

(3) A disqualification order issued by the market administrator shall set forth the findings and conclusions on the basis of which it is issued.

(h) *Appeals.*

(1) *From denials of application.* Any cooperative or federation whose application for qualification has been denied by the market administrator may, within 30 days after notice of such denial, file with the Commissioner a written petition for review. But the failure to file such petition shall not bar the cooperative or federation from again applying to the market administrator for qualification.

(2) *From disqualification orders.* A disqualification order by the market administrator shall become final 30 days after its service on the cooperative or federation unless within such 30-day period the cooperative or federation files a written petition with the Commissioner for review thereof. If such petition for review is filed, payments for which the cooperative or federation has been disqualified by the order shall be held in reserve by the market administrator pending ruling of the Commissioner, after which the sums so held in reserve shall either be returned to the producer-settlement fund or paid over to the cooperative or federation depending on the Commissioner's ruling on the petition. If such petition for review is not filed, any payments which otherwise would be made within the 30-day period following issuance of the disqualification order shall be held in reserve until such order becomes final and shall then be returned to the producer-settlement fund.

(3) *Record on appeal.* If an appeal is taken under subparagraph (1) or (2) of this paragraph, the market

administrator shall promptly certify to the Commissioner the ruling or order appealed from and the evidence upon which it was issued: *Provided,* That if a hearing was held the complete record thereof, including the applications, petitions, and all exhibits or other documentary material submitted in evidence shall be the record so certified. Such certified material shall constitute the sole record upon which the appeal shall be decided by the Commissioner.

(i) *Regulations.* The market administrator is authorized to issue regulations and amendments thereto to effectuate the provisions of this section and to facilitate and implement the administration of its provisions. Such regulations shall be issued in accordance with the following procedure:

(1) All proposed rules and regulations and amendments thereto shall be the subject of a meeting called by the market administrator, at which all interested persons shall have opportunity to be heard. Not less than five days prior to the meeting, notice thereof and of the proposed regulations or amendments shall be mailed to qualified cooperatives and federations. A stenographic record shall be made at such meetings which shall be public information and be available for inspection at the office of the market administrator.

(2) A period of at least five days after the meeting shall be allowed for the filing of briefs.

(3) All regulations and amendments thereto issued by the market administrator pursuant to this section must be submitted in tentative form to the Commissioner for approval, shall not be effective without such approval. The regulations or amendments in tentative form shall be forwarded also to cooperatives and federations qualified under this section and to other persons upon request in writing. The Commissioner shall either approve the reg-

ulations or amendments thereto submitted by the market administrator or direct the market administrator to reconsider the tentative rules or amendments. In the event the market administrator is directed to give reconsideration to the matter, the market administrator shall either issue revised tentative regulations or amendments or call another meeting pursuant to this section for additional consideration of the rules or amendments.

(j) *Reports and records.* A qualified cooperative or federation and any federated cooperative in a qualified federation shall make such reports to the market administrator as may be requested by him for the administration of the provisions of this section, and shall maintain and make available to the market administrator or his representative such records as will enable the market administrator to verify such reports.

(k) *Notices, demands, orders, etc.* All notices, demands, orders or other papers required by this section to be given to or served upon a cooperative or federation shall be deemed to have been given or served as of the time when mailed to the last known secretary of the cooperative or federation at his last known address.

(l) *Adjustment period.* Any cooperative which was qualified, on the effective date of this section, to receive payments pursuant to the provisions of Sec. 927.76 as effective December 31, 1952 (referred to in this paragraph as the 'former provisions'), shall continue to receive payments pursuant to and subject to the conditions specified in such former provisions on milk received from producers during the 90-day period immediately following the effective date of this section; and if such cooperative has applied, or is a federated cooperative of a federation which has applied, for qualification pursuant to this section prior to the expiration of such 90-day period, it shall continue to receive payments pursuant to the former pro-

visions beyond such 90-day period until such time as the market administrator has ruled upon such application: *Provided,* That a cooperative or a federation may be qualified to receive payments pursuant to this section within such 90-day period; and *Provided Further,* That in no event shall a cooperative, or a federated cooperative in a federation, receive payment under the former provisions for any period following the effective date of qualification of the cooperative or federation under this section. For the purposes and to the extent specified in this paragraph, the provisions of Sec. 927.76 as effective December 31, 1952, shall remain in force and effect after the effective date of this Section."

C. CHESTER DU MOND, Commissioner
of Agriculture and Markets of the
State of New York

By /s/ Kenneth F. Fee
Kenneth F. Fee, Director
Division of Milk Control

Dated at Albany, N. Y.
November 24, 1953.

No. 697

MAR 23 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, et al.,

Petitioners.

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, Intervenor, and

ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,

Respondents.

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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